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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

GERALD MASON, Warden,
Petitioner,

vs.

CHARLIE LEE MITCHELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MICHAEL E. DUGGAN
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training and Appeals

*JEFFREY CAMINSKY (P 27258)**
Principal Attorney, Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5846

*** Counsel of Record**

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

Federal Courts may not grant habeas relief by applying a new rule of law. Here, following remand by this Court to apply the decision in *Bell v Cone*, the Sixth Circuit found counsel's thirty-day suspension from the practice of law, ending on the eve of trial. and Respondent's uncorroborated allegations of inadequate consultation, to be a *per se* denial of counsel regardless of counsel's actual performance at trial, because the "pre-trial period" was a "critical stage" of the proceedings. Did the Sixth Circuit's decision apply a new rule of law?

II.

Cronic v United States and *Bell v Cone* each rejected a "*per se*" or "categorical" approach to ineffective assistance of counsel claims, requiring courts to examine counsel's actual performance under *Strickland v Washington* in every case while observing in *dicta* that a "total deprivation" of counsel is presumed prejudicial. Here, defense counsel was suspended from practicing law for 30 days, but reinstated by the time of trial, and state courts rejected Respondent's claim of inadequate consultation as unsupported by the evidence. Did the Sixth Circuit correctly find the state court's evaluation of counsel's performance under *Strickland*, and ensuing rejection of a *per se* test for ineffective assistance of counsel, to be an unreasonable application of this Court's decision in *Cronic*?

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

GERALD MASON, Warden,
Petitioner.

vs.

CHARLIE LEE MITCHELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOW COMES the State of Michigan, by **MICHAEL E. DUGGAN**, *Prosecuting Attorney for the County of Wayne*, **TIMOTHY A. BAUGHMAN**, *Chief of Research, Training, and Appeals*, and **JEFFREY CAMINSKY**, *Principal Attorney, Appeals*, and prays that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals of the United States of America, entered in this cause on April 7, 2003, rehearing denied June 25, 2003 and mandate issued July 7, 2003.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at 454 Mich 145; 560 NW2d 600 (1997). The opinion of the District Court is reported at 60 F Supp 655 (ED Mich. 1999). The initial opinion of the Sixth Circuit affirming the District Court order granting the writ is reported at 257 F3d 554 (CA 6, 2001). The order of this Court remanding the cause for reconsideration is reported at 536 US 901 (2002). The opinion of the Sixth Circuit reaffirming the District Court's order is reported at 325 F3d 732 (CA 6,2003).

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its opinion on remand on April 7, 2003, denied a timely motion for rehearing on June 25, 2003, and issued its mandate on July 7, 2003. This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of

> law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Most of the relevant facts are found in the opinion of the Michigan Supreme Court:[1]

> On October 3, 1988, decedent Raymond Harlin was the victim of an altercation that took place in defendant Charlie Mitchell's apartment. Mr. Harlin was beaten with fists, a blackjack, brass knuckles, a baseball bat, and a woodcarving knife before he was shot. He jumped out the window of the third floor apartment and took a cab to Henry Ford Hospital where he died. The cause of death was gunshot wounds to the neck and back.
>
> Defendant was charged with first-degree murder. Gerald Evelyn was appointed counsel for Mr. Mitchell on October 6, 1988, and represented him at the preliminary examination, on October 14, 1988. At the preliminary examination, the prosecution called Tyrone Thompson, and Mr. Evelyn actively interposed objections during his testimony and argued against the bindover. Mr. Evelyn represented defendant at the final conference on February 3, 1989. On April 5, six months after appointment, Mr. Evelyn received a disciplinary suspension which expired May 5, 1989.
>
> Trial began on May 8, 1989. Tyrone Thompson testified as he had at the preliminary hearing that defendant was the leader of a drug ring and gave the order to shoot Mr. Harlin, which was carried out by codefendant Lamont Mason. Defendant Mitchell did not take the stand, and counsel contended in closing argument that Mr. Thompson's testimony that

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[1] *People* v *Mitchell*, 454 Mich 145, 148ff; 560 NW2d 600 (1997)(Citations omitted).

defendant ordered the killing was equivocal and that the prosecution had failed to carry the burden of proof beyond a reasonable doubt.

Before trial, defendant wrote six letters to the trial judge, the chief judge, and others, requesting removal of counsel. Defendant had complained that Mr. Evelyn had not visited him at the Wayne County jail, instead only meeting with him in the "bullpen" at the Recorder's Court. Defendant also believed that there were certain motions that Mr. Evelyn needed to make before the time to do so expired. On April 27, 1989, eleven days before jury selection was to begin, defendant appeared before the court in propria persona for a hearing on defendant's "motion for withdrawal of counsel." Defendant informed the judge on the record that he did not believe counsel was responsive to his concerns, and that counsel had been suspended from practice for thirty days from April 5, 1989 to May 5, 1989. [Defendant had been notified by Mr. Evelyn and advised to contact counsel's partner, Myzell Sowell].[2] Counsel was officially reinstated on May 8, 1989, the day jury selection in defendant's trial began. That day, Mr. Evelyn advised the court that defendant wanted him removed and had filed a grievance against him. Counsel did not indicate that he was unprepared.

The judge had taken the April 27 motion under advisement pending receipt of a response from Mr. Evelyn. The issue was revisited on Tuesday, May 9, the second day of jury selection. Mr. Evelyn advised the court that 'as of yesterday evening,' at the conclusion of proceedings, defendant was satisfied with his representation; but, because he had been unable to visit him in the jail that evening, defendant would like him removed as counsel. Mr. Evelyn stated that he had talked with defendant on numerous occasions. The court found nothing that would warrant a change of counsel, nor would the court 'abort' the proceedings.

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[2] The bracketed material comes from Footnote 2 of the Michigan Supreme Court opinion, inserted into the opinion at the appropriate portion of the Court's recitation of facts.

The defendant confirmed that he had received copies of the prosecutor's file in the instant case and another pending case and his transcripts in March, but stated that counsel's failure to discuss matters with him had lead to specific deficiencies, which he detailed. The court directed counsel to confer with defendant and to evaluate and report back regarding any motions defendant might wish to be heard, and Mr. Evelyn's professional opinion regarding whether they were appropriate. The motion was denied without prejudice.

Thereafter, the defendant's concerns over evidence seized at the apartment building from apartment 302, and the validity of the search warrant with regard to apartment 302 were resolved to defendant's satisfaction with a stipulation in which the parties agreed that none of the evidence from apartment 302 except the weapons involved would be admitted. [Defendant resided in apartment 301; 302 was vacant].[3] Defendant expressly waived his right to a *Walker*[4] hearing for the purpose of suppressing his statement. On Monday, May 15, 1989, Mr. Evelyn informed the court that he had received a grievance filed by the defendant on May 1. Defendant stated he

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[3] **The bracketed material comes from Footnote 4 of the Court's opinion, inserted in a stylistically unobtrusive place in the Court's recitation of facts.**

[4] ***People v Walker*, 374 Mich 331; 132 NW2d 87 (1965) is the state court decision establishing the procedure for conducting a hearing into the admissibility of a defendant's statement to police.**

> was satisfied with counsel's resolution of his concerns and wanted to withdraw the grievance.
>
> "Following defendant's conviction on May 17, 1989, of second degree murder, defendant appealed, and the Court of Appeals remanded the case for a *Ginther*[5] hearing. Trial counsel was not called as a witness, and the trial court held that defendant had not shown objective unreasonableness, or prejudice....Thereafter, the Court of Appeals affirmed defendant's conviction...."

On March 27, 1997, the Michigan Supreme Court also affirmed Respondent's conviction, in a published opinion.[6] The Court considered and discussed Defendant's challenge to the adequacy of his representation by counsel, surveying various opinions of the United States Supreme Courts and other jurisdictions. Accepting the findings of the state trial judge that the record contained no showing of prejudice, the Court noted that Respondent had not called trial counsel to the stand, that no record was made of counsel's actions, and by their own testimony none of the witnesses Respondent called at the evidentiary hearing were eyewitnesses. In addition, the three witnesses Respondent did call presented testimony which was "inconsistent and contradictory." The Court concluded that, without an inquiry into counsel's conduct and case preparation, Respondent could not establish any "prejudice" stemming from the mere fact of "counsel's thirty-day suspension [from the practice of law] during seven months of representation."[7]

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[5] *People* v *Ginther*, 390 Mich 436; 212 NW2d 922 (1973) establishes the state court procedure for a post-conviction inquiry into the performance of counsel.

[6] 454 Mich 154; 560 NW2d 600 (1997)

[7] *People* v *Mitchell*, at 152-172

On March 28, 1998, Respondent filed the instant Petition for Writ of Habeas Corpus. On March 30, 1999, the Magistrate issued a report and recommendation that the Petition be dismissed as meritless. On April 16, 1999, Respondent filed objections to the report, and the District Court entertained arguments on the matter on May 27, 1999.

On July 8, 1999, the District Court entered Judgment against Respondent, granting the writ. On July 12, 2001, the Sixth Circuit affirmed the District Court order granting the writ, finding that the Michigan Supreme Court while the Michigan Supreme Court had "properly noted the general principles that are applicable to this case," it had unreasonably applied this Court's decision in *Cronic v United States*.[8] One dissenting judge would have reversed the District Court, and dismissed the petition.

On July 23, 2001, Petitioner filed a motion for rehearing with a suggestion for rehearing *en banc*; on August 17, 2001, the Sixth Circuit declined to accept the motion as "untimely."

On —, this Court remanded the cause for reconsideration in light of its recent decision in *Bell v Cone*.[9] On remand, with one judge dissenting, the Sixth Circuit once again affirmed the District Court order granting the writ; and on —, 2003, the Sixth Circuit denied Petitioner's timely motion for rehearing. In both its decisions, the Sixth Circuit described as "undisputed" Respondent's factual claim that counsel had never met with him prior to trial, despite the fact that such a claim was specifically rejected by the Michigan Supreme Court as unproven.

The case is again before this Court on a petition for a writ of certiorari.

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[8] *Cronic* v *United States*, 466 US 648 (1984).

[9] *Bell v Cone*, 535 US 685 (2002).

REASONS FOR GRANTING THE WRIT

In *Williams v Taylor,*[10] this Court sought to resolve a growing controversy among the Circuits in determining when a state court conviction rested upon an "unreasonable" application of federal law, under the AEDPA.[11] Unfortunately, as this case demonstrates, the Circuits remain confused about the standards to apply — and seem now to be wandering astray in realms long thought settled. This case provides the Court with a good vehicle to bring some resolution to the area of habeas law — as well as examining an intriguing error of law arising under novel circumstances.

Present law limits habeas relief to obvious state court misapplications of "clearly established Federal law," as determined by this Court's precedents at the time the state court conviction became final.[12] In *Williams*, this Court sought to guide the lower courts by emphasizing that, to warrant habeas relief, the state court's resolution of the federal constitutional claim at issue had to be —

- On a claim in which the outcome was dictated by existing precedent at the time of direct appeal; and
- Wrong, in light of clearly established, existing Supreme Court precedent; and
- So clearly wrong as to be "unreasonable" — mindful of the fact that "an *unreasonable* application of

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[10] *Williams* v *Taylor*, 529 US 362 (2000).

[11] The Antiterrorism and Effective Death Penalty Act of 1996 recodified the federal habeas statute, and forms the basis of the present habeas petition. *See*, 28 USC §2254.

[12] 28 USC §2254(d)(1)

> existing federal law is different from an *incorrect* application of federal law."[13]

As Justice O'Connor noted in her opinion for the Court in *Williams*, however, the term "unreasonable" is "difficult to define"[14] with abstract precision, and must be inferred from the state's application of the correct controlling legal principles to the facts of a given case. Thus, while applying the wrong legal standard would result in a decision which was "contrary to...clearly established federal law,"[15] a state court decision applying the correct legal standard would be an "unreasonable application of...clearly established federal law" only if it applied the correct governing principles unreasonably in the context of the facts.[16]

Unfortunately, as this case demonstrates, there remains much confusion concerning the proper scope of habeas review under the AEPDA — and the appropriate deference to be shown to the judgments of a state criminal court. And to avoid perpetuating the problem — and, perhaps, to avoid having a larger problem to resolve in the near future, as the confusion escalates and Circuits come to resolve new legal questions on habeas once again — this case presents a timely and interesting vehicle for bringing order out of the growing confusion.

In this case, the state bar had suspended Respondent's defense attorney for thirty-days, just prior to trial. Respondent claimed that his attorney had never met with him[17] — a claim at odds with defense counsel's representation to the trial court, and one that the Michigan Supreme Court rejected as unproven because Respondent did not call the attorney to testify at the post-conviction evidentiary hearing inquiring into counsel's performance. However, finding that "[t]he pre-trial period" constituted a "critical stage" of the proceedings, the Sixth Circuit ruled that Respondent's allegations of inadequate consultation, and the fact that he was "unrepresented during the entire month prior to his trial"entitled him to relief on habeas as a *per se* denial of counsel. Specifically, the Sixth Circuit held that the Michigan Supreme Court had unreasonably applied this Court's precedents by looking to *Strickland v Washington*[18] to evaluate the particulars of counsel's performance, rather than applying a prejudice *per se* standard, and reversing for a total denial of counsel, which the Circuit Court found required by this Court's decision in *Cronic v United States*.[19] On remand by this Court, with its attention directed to the recent case of *Bell v Cone*,[20] the Sixth Circuit persisted in its insistence upon a "*per se*" standard — despite this Court's admonition that a per se standard is inappropriate where an accused is challenging counsel's performance at specific, identifiable points of the proceedings, rather than claiming a total failure of the adversarial process.[21]

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[13] *Williams v Taylor, supra* at (146 L Ed 2d 428).

[14] *Williams v Taylor, supra* at 146 L Ed 2d 428.

[15] 28 USC §2254(d)(1). *See, Williams v Taylor, supra* at 146 L Ed 2d 425-426, 430.

[16] 28 USC §2254(d)(1). *See, Williams v Taylor, supra* at 146 L Ed 2d 425-430.

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[17] The Sixth Circuit noted an "undisputed amount of time" that defense counsel spent conferring with Respondent, pegging the time at six minutes. This strikes Petitioner as misleading, since Petitioner has insisted in all courts at all levels that the actual amount of time was quite longer. Moreover, the Sixth Circuit's conclusion is at odds with the state court record and the factual conclusion of the Michigan Supreme Court — and is, while perhaps literally true, misleading to the point of being "Clintonesque": while perhaps neither side disputes that counsel conferred with Respondent for at least six minutes, the "disputed" amount of time is actually quite larger.

[18] *Strickland* v *Washington*, 466 US 668 (1984).

[19] *Cronic* v *United States*, 466 US 648 (1984).

[20] *Bell v Cone*, 535 US 685 (2002).

While a thorough parsing of the Sixth Circuit's errors would be lengthy — and more appropriate on full review — it is obvious that the thrust of its reasoning is misguided: *Cronic* itself did not apply a "*per se*" test, but instead applied *Strickland* to the facts before it — and the language upon which the Sixth Circuit relied in deciding that Michigan had unreasonably applied this Court's precedents was passing *dicta*, rather than the actual case holding.[22] But, as shown below, the fundamental thrust of the decision demonstrates a determination to stray beyond the appropriate limits of habeas review. *Bell v Cone* purported to ensure application of a "*per se*" test only to redress a total breakdown in counsel's functioning, rather than claimed inadequacies arising during the course of representation. And as this particular error carries implications for the future, in the Sixth Circuit and beyond, this case would be a timely vehicle for this Court to bring some needed guidance in this area of the law.

A. The Sixth Circuit's decision in this case applied a new rule of law, since there is no existing precedent from this Court holding that the "pre-trial period" is a "critical stage of the proceedings."

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[21] *Bell v Cone, supra* at 535 US ___, 152 L Ed 2d 928.

[22] Aside from misapplying the holding in *Cronic*, the Sixth Circuit's decision also appears to be contrary to this Court's decision in *Williams v Taylor, supra* at 148 L Ed 2d 429 (Noting that "clearly established Federal law, as determined by the Supreme Court of the United States....refers to the holdings, as opposed to the dicta, of this Court's decisions at the time of the relevant state court decisions."

Fundamental to present-day habeas jurisprudence is the rule that federal habeas review is judged by the law existing at the time of the state court proceedings --- and that a new rule of law is unavailable to a habeas petitioner. We see this principle at work in this Court's decisions in *Teague v Lane*. as well as the codification of *Teague* and its progeny in the AEPDA's limitation of habeas relief to misapplications of "clearly established Federal law, as determined by the Supreme Court of the United States."[23] The first question this Petition raises is whether the Sixth Circuit's opinion truly applied pre-existing precedent — or whether they crafted a new rule of law in order to overturn a state court judgment that they deemed to be incorrect, and would have decided differently on the merits.

A brief glance at the Sixth Circuit's reasoning in this case suggests that it misunderstood its limitations — and proceeded to undertake a review on the merits in a manner suggesting that it will continue the approach, unless constrained by a higher authority. To put it simply, this Court has never held that the "pre-trial period" is a "critical stage" of a criminal prosecution, which would justify the *per se* reversal of an otherwise valid conviction without an inquiry into the facts and circumstances of counsel's performance. And the Sixth Circuit reached its conclusion — finding a *per se* denial of counsel stemming from Respondent's allegations of inadequate consultation with counsel in the period preceeding trial — not by citing to any pertinent case *holding*, but by construing pertinent *dicta* in *Cronic* to require this result, in light of some of this Court's precedents, which it distinguished from other precedents. Most notably, the Sixth Circuit cited this Court's decision in *Powell v Alabama*,[24] in support of its view of *Cronic* — and distinguished the decision in *Morris v Slappy*[25] from this case on its facts while faulting the Michigan Supreme Court for relying on the passage in *Slappy* noting that "[n]ot every restriction on counsel's time or opportunity to investigate or consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel..."[26]

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[23] 28 USC §2254(d)(1).

[24] *Powell* v *Alabama*, 287 US 45 (1932). Ironically, however, Powell was a due process claim, *see, Powell*, at 70 — since the Sixth Amendment did not apply to the states until the 1963 decision in

Clearly, it appears to Petitioner, a decision which requires a court to distinguish between two or more precedents[27] of this Court cannot be dictated by "clearly established Federal law" — and would therefore have qualified as a "new rule of law" even under this Court's pre-AEDPA case law,[28] much less under the even more restrictive standards now in effect.[29] Moreover, as the Sixth Circuit's approach appears to conflict with those of other Circuits,[30] this case presents the Court

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Gideon v *Wainright*, 372 US 335 (1963).

[25] *Morris* v *Slappy*, 461 US 1 (1983).

[26] *Morris v Slappy, supra* at 11-12.

[27] This would be the general test Petitioner would propose, as another way of stating what this Court observed in *Goeke v Branch*, 514 US 115, 118 (1995) — that a new rule is one in which the result was not *dictated* by "precedent existing at the time the defendant's conviction became final." However, other precedents from this Court appear to case even more doubt on the Sixth Circuit's application of *Cronic*: *see, eg, Chambers* v *Maroney*, 399 US 42, 54 (1970)(Defendant's representation by attorney he first met minutes before his retrial held no denial of counsel, absent demonstration of prejudice); *Avery* v *Alabama*, 308 US 444 (1940)(Counsel's appointment three days before trial in capital case held no denial of counsel).

[28] *See, Teague* v *Lane*, 489 US 288 (1989).

[29] *Williams v Taylor, supra* at 246 L Ed 2d 429-430.

[30] *See, eg, Felder* v *Johnson*, 180 F3d 206 (CA 5, 1999) *cert den* 528 US 1067 (1999)(Noting that proposed rule was not *dictated* by

with a good vehicle to explore the nature of what constitutes a "new rule" — within the context of a disagreement of approach between a Federal Circuit and a state supreme over the application of several arguably pertinent decisions of this Court over the scope and effect of the Sixth Amendment's right to counsel.[31]

B. *Bell v Cone* specifically precludes use of a "*per se*" reversal standard when an accused challenges the performance of counsel at a specific point of the proceedings. Here, the Sixth Circuit misapplied *Bell v Cone* on remand by finding the State's application of *Strickland v Washington*, rather than a *per se* standard under *Cronic v United States*, was an unreasonable application of this Court's precedents to a petitioner's claim that counsel's

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"precedent existing at the time the defendant's conviction became final"); *Weeks* v *Angelone*, 176 F3d 249 (CA 4, 1999); (If result is not compelled by existing precedent, it proposes a new rule of law); *Glock* v *Singleterry*, 65F3d 787 (CA 11, 1995)(Noting that "existing precedent" must be specific, rather than general statement of principles, in order to compel result; pre-AEDPA petition); *cf. Willis* v *Aikens*, 8 F3d 556 (CA 7, 1993)(Pre-AEDPA petition). *But see*, *Bell* v *Hill*, 190 F3d 1089 (CA 9, 1999)(Pre-AEDPA petition).

In addition, the Sixth Circuit's approach appears in conflict with this Court's holding in *Goeke* v *Branch, supra.*

[31] Ironically, if this Court were to agree with the Sixth Circuit's view of *Cronic* –– and someday hold on the merits that a defense attorney's suspension from the practice of law on the eve of trial, coupled with allegations of inadequate pre-trial consultations actually did constitute a *per se* denial of counsel, and determine to apply the rule retroactively to habeas petitioners — under *Tyler* v *Cain*, 533US ___; 121 S Ct ___; 150 L Ed 2d 632 (2001), the ruling would be unavailable to any habeas petitioner who had not already raised it.

pre-trial suspension unconstitutionally impaired his ability to prepare for trial.

In its initial opinion, the Sixth Circuit noted that the Michigan Supreme Court rejected a claim that counsel's pre-trial preparation was a "critical stage of the proceedings"— and declined to hold that counsel's 30-day suspension from the practice of law constituted a *per se* denial of counsel during a "critical stage" of the proceedings sufficient to warrant automatic reversal, without regard to counsel's actual performance at trial. Since the Sixth Circuit concluded otherwise, that court affirmed the District Court's order granting a writ of habeas corpus — which this Court vacated on certiorari, and remanded for consideration in light of its decision in *Bell v Cone*.[32]

In *Bell v Cone*, this Court confronted another case in which the Sixth Circuit applied a "*per se*" test for a Sixth Amendment claim — and in which it concluded, as in *Cronic v United States*, that a "*per se*" test was inapplicable on the facts before it. In *Cone*, the accused had claimed that counsel had failed to subject the prosecution's case for the death penalty to "meaningful adversarial testing" by declining to present evidence and by waiving his closing argument at the sentencing phase — though counsel had made an opening statement calling the jury's attention to various mitigating factors in the case — and the Sixth Circuit, finding a failure of counsel at the sentencing phases, applied a "*per se*" test in overturning the accused's death sentence.[33] Noting, however, that counsel's decision to forego closing argument had the desired effect of preventing the prosecution's most effective advocate from delivering a last argument in rebuttal, this Court rejected any notion that such a tactical choice was anything beyond claimed failings "of the same ilk as other specific attorney errors" which fell within the performance and prejudice components of *Strickland v Washington.* Accordingly, this Court rejected use of any "per se" test — cautioned that courts must "indulge a strong presumption that counsel's conduct falls with the wide range of reasonable professional assistance" — and remanded the cause for further proceedings.[34]

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[32] *Bell v Cone, supra.*

[33] *Bell v Cone, supra* at 152 L ed 2d 926.

Following this Court's remands with instructions to apply *Bell v Cone*, the Sixth Circuit's opinion on remand was little different than the original: the court still deemed pre-trial preparation a "critical stage" of the proceedings, and still applied a "per se" reversal standard — without regard to how well counsel may have performed during the trial itself, and despite the state court's factual determination that defendant's claims of lack of consultation were unsupported by the record. The net effect, in Petitioner's view, is that the Sixth Circuit concluded that *Bell v Cone* had no application to the instant case: moreover, Petitioner cited *Powell v Alabama* as a "critical stage" case — when, in fact, this Court concluded that Powell was a case presenting "circumstances were competent counsel very likely could not" render any effective assistance (*Bell v Cone*, at 152 L Ed 2d 927-928). .

In application, the Sixth Circuit's "*per se*" test appears to have the practical effect of avoiding the deference due to the factual determination of a state court that counsel rendered effective assistance of counsel by making that inquiry legally irrelevant: simply put, if the performance of counsel is not a material fact, then a habeas court is not constrained by the state's factual findings, and may simply proceed to grant a writ without regard to counsel's actual performance at trial. This is not, in Petitioner's view, a correct understanding of this Court's Sixth Amendment jurisprudence — and a potentially disastrous method of adjudicating Sixth Amendment claims, from the standpoint of policy.

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[34] *Bell v Cone, supra* at 152 L Ed 2d 931.

Accordingly, it appears that the Sixth Circuit continues to misunderstand and misapply this Court's precedents, and that this Court's further intervention is necessary to prevent the problem from spreading

C. The Michigan Supreme Court's application of *Strickland v Washington* to a defendant's claim that counsel did not afford him adequate representation because of his temporary pre-trial suspension from the practice of law, and did not consult with him adequately before trial, was not an unreasonable application of this Court's decision in *Strickland,* or its decision in *Cronic v United States.*

Writing for the Court in *Williams v Taylor*, Justice O'Connor noted the difficulty in defining an "unreasonable" application Federal law, but noted that "an *unreasonable* application...is different from an *incorrect* application...."[35] And if a state court "identifies the correct governing legal principle," but proceeds to apply the principle "unreasonably...to the facts of the prisoner's case," then a Federal habeas court may grant relief even under the restrictive provisions of the AEDPA.[36]

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[35] *Williams v Taylor,* at 146 L Ed 2d 428.

[36] *Williams v Taylor,* at 146 L Ed 2d 430.

In *Williams*, this Court concluded that the State court had unreasonably applied Federal law by construing this Court's decision in *Lockhart v Fretwell*[37] — holding that the likelihood of a favorable outcome due to defense counsel's failure to exploit a state court's incorrect interpretation of law was not the sort of "legitimate prejudice" leading to a finding of ineffective assistance of counsel — as supplanting the Court's decision in *Strickland v Washington*: overruling the trial court's determination that counsel's failure to advance mitigating evidence in the death penalty phase of the petitioner's trial created a reasonable probability that the result of the sentencing phase would have been different, the Virginia Supreme Court had ruled that the petitioner had shown insufficient prejudice to warrant a new sentencing hearing — on grounds that the mere likelihood of a different outcome did not matter, since the petitioner had failed to establish that counsel's omissions had made the sentencing proceeding "fundamentally unfair."[38] On certiorari, this Court reversed — noting that "*Strickland* provides sufficient guidance for resolving virtually all ineffective assistance of counsel claims,"[39] and that it was a misapplication of Federal law to look beyond *Strickland* to resolve a challenge to the competency of counsel.[40]

In this case, the apparent misapplication of Federal law stems from the decisions by the Sixth Circuit, rather than the Michigan Supreme Court: while the Sixth Circuit appears to have mistaken *dicta* in *Cronic* for the case holding, the state court noted this Court's holding in Strickland, distinguished that case from *Cronic* and other cases, and gave a nuanced opinion, weighing all facts and precedents, and applying them to the case at bar in a manner which, though there may be room for professional disagreement, can hardly be described as "unreasonable": The Michigan Supreme Court noted the "continuum" of circumstances which *Cronic* also noted,[41] ranging from total denial of counsel,[42] through counsel's failure to provide any assistance,[43] beyond direct state interference with counsel's ability to render assistance,[44] past the "rare cases" in which circumstances render it unlikely that any attorney could provide effective assistance,[45] to the normally wide range of professional discretion courts accord counsel to function.[46] And the Michigan Supreme Court carefully weighed and analyzed cases from this Court, and other jurisdictions, and finally concluded — citing analysis of both *Cronic* and *Strickland* by Professors LaFave and Israel

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[37] *Lockhart* v *Fretwell*, 506 US 364 (1993).

[38] *Williams* v *Taylor*, at 146 L Ed 2d 405.

[39] *Williams* v *Taylor*, at 146 L Ed 2d 417.

[40] The Court noted — but did not develop or describe — that there were "few situations in which prejudice may be presumed." *Williams* v *Taylor*, at 146 L Ed 2d 471.

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[41] *People* v *Mitchell*, 454 Mich 145, 152-155; ___ NW2d ___ (1997).

[42] *People v Mitchell*, at 154, *citing Cronic*, at 659; *United States* v *DeCoster*, 199 US App DC 359, 364; 624 F2d 196 (1976).

[43] *People v Mitchell*, at 154; *citing*, *Cronic*, at 654, 659.

[44] *People v Mitchell*, at 154; *citing Geders* v *United States*, 425 US 80 (1976); *Brooks* v *Tennessee*, 406 US 605 (1972); *Ferguson* v *Georgia*, 365 US 570 (1961); *Crutchfield* v *Wainwright*, 803 F2d 1103 (CA 11, 1986)(*En banc*).

[45] *People v Mitchell*, at 155; *citing Powell* v *Alabama*, 287 US 45 (1932).

[46] *People v Mitchell*, at 155-168, *citing, inter alia, Washington v Strickland, supra; Cronic v United States, supra; Geders v United States, supra; Powell v Alabama, supra; Morris* v *Slappy*, 461 US 1 (1983). *See also*, 2 LaFave & Israel, CRIMINAL PROCEDURE, §11.7, p 25 (1991 Supp).

— that the appropriate inquiry was a case-by-case inquiry into counsel's performance, rather than a categorical approach:

> The [United States] Supreme Court has rejected a categorical prophylactic approach to claims of counsel's deficient performance and of failure to adequately prepare or investigate in favor of an inquiry into actual performance. As Professors LaFave and Israel have noted, "If the Supreme Court had not so clearly indicated [previously], its subsequent opinions in...*Cronic* and *Strickland*...established without doubt its rejection of any such across-the-board categorical approach....Read in context with *Cronic*, *Strickland* leaves no doubt that a strictly judgmental approach applies to ineffectiveness claims based upon the incompetent performance of counsel."[47]

Therefore, concluding that the proper approach was a factual inquiry under *Strickland*, rather than a blanket presumption of prejudice, the Michigan Supreme Court determined that a showing of prejudice was required, before a defendant was entitled to a new trial:

> To justify reversal under both the United States and Michigan constitutions, defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial.[48]

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[47] ***People v Mitchell,*** **at 158, *citing* LaFAve & Israel, at 25, 45.**

[48] ***People v Mitchell,*** **at 158.**

And, noting that defense's counsel's performance in this case[49] — as well as Respondent's tactical decision not to call him in the post-conviction inquiry into counsel's performance — the Michigan Supreme Court found that it had no factual basis for a finding of ineffective assistance of counsel.[50]

By contrast, the Sixth Circuit made no review of counsel's actual performance in either of its opinions, deeming it largely irrelevant to the case at bar — twice finding not that the Michigan Supreme Court failed to identify the proper principles, but erred by analyzing those principles in light of the facts of the case:

> Our analysis makes clear that, although the Michigan Supreme Court properly identified the appropriate [United States] Supreme Court precedent, i.e, that counsel's absence during a critical stage of the proceedings constitutes a per se denial of counsel, it then erroneously and unreasonably applied that precedent by failing to consider whether the pre-trial period was "critical."[51]

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[49] The State Court noted that counsel was successful in excluding damaging evidence from the factfinder, had obtained full discovery from the prosecutor — which he turned over to Respondent — and succeeded in winning a reduction of charges from first- to second-degree murder. Initially facing a mandatory life offense, Respondent ultimately received sentence of ten-to-fifteen years imprisonment. *People v Mitchell*, at 148-152, 162-171.

[50] *People v Mitchell*, at 165-166.

[51] *Mitchell* v *Mason*, ___ F3d ___, ___ (CA 6, 2001).

The Sixth Circuit's subsequent observation that the Michigan Supreme Court "also failed to apply *Geders v United States*," appears to overlook the fact that the Michigan Supreme Court both cited and distinguished *Geders*. *People v Mitchell*, at 154, 161-162. Moreover, with due respect to the Sixth Circuit's majority, the Michigan Supreme Court did not "fail[] to consider whether the pre-trial period was 'critical,'" but determined that Respondent "was not unrepresented

* * * * *

> In light of the Michigan Supreme Court's assumption that the pre-trial period...was not a "critical stage" of the proceedings, the Michigan Supreme Court unreasonably applied clearly established Supreme Court precedent to the facts of this case...by rejecting the per se prejudice analysis and insisting on evaluating Mitchell's claim through the lens of *Strickland*.[52]

Given the Sixth Circuit's reliance upon this Court's decision in the very case in which it rejected a "*per se*" approach to inquiries into the performance of counsel, it is clear that it is the Sixth Circuit — and not the Michigan Supreme Court — which is misapplying this Court's precedents, or misreading the role of a federal court under the AEDPA. Accordingly, this case would be an appropriate one for Supreme Court intervention, before the problem gets further out of hand.[53]

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during any critical stage of the proceedings," flatly rejecting the Sixth Circuit's determination on the legal question of law presented, and concluding — citing this Court's opinions in *Perry* v *Leeke*, 488 US 272 (1989) and *Coleman* v *Alabama*, 399 US 1 (1970) — that while the right to counsel "extends to representation during any 'critical stage' of the proceedings," this right "does not guarantee a defendant a private in-depth interview during pretrial in the place of the defendant's choosing." *People v Mitchell*, at 152, n 9.

The Sixth Circuit appears to relegate this Court's decision in *Perry v Leeke* to the period of time "in which a defendant is testifying," which has no effect on the defendant's "absolute right" to consult with his attorney at any other time. *Mitchell v Mason,* at ___, n 13.

[52] *Mitchell v Mason (On Remand),* ___ F3d ___ (CA 6, 2003).

[53] Petitioner notes a similar misunderstanding of both the applicable precedents, and the scope of habeas review under the AEDPA, occurring in the Sixth Circuit cases of *Hunt* v *Mitchell*, ___ F3d ___

D. Other aspects of this case warrant this Court's attention — including the internal conflict within the Sixth Circuit, and the apparent conflict between this case and decisions in other Circuits.

In addition to the Sixth Circuit's apparent misapplication of law, several aspects of this case make it an interesting vehicle for this Court to study both the meaning of the Sixth Amendment's right to counsel, and the scope of federal review permitted under the AEDPA: counsel's thirty-day suspension, ending on eve of trial, raises several interesting factual and legal questions concerning the effect of disciplinary rules on the application of the Sixth Amendment, and the role of counsel's actual performance in any Sixth Amendment inquiry. The Sixth Circuit's decision, if allowed to stand, appears to elevate "pre-trial consultations" as a necessary element of the right to counsel — and suggests that if the record is unclear or inadequate, that it is the *State*, rather than the defendant, which must suffer the consequence of a failure of proof — since the Sixth Circuit dismissed as insignificant a fact deemed critical by the State Supreme Court, *ie,* the defendant's failure to call his attorney to the witness stand at the post-conviction hearing. This application directly conflicts with this Court's decision in *Bell v Cone* — which reserves application of a "*per se*" ineffectiveness standard to cases in which there is a complete failure of counsel, rather than a claim that some portion of counsel's performance was inadequate or lacking. And the conflicts

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(CA 6 6#99-4308, decided August 22, 2001) and *Northrop* v *Trippett*, ___ F3d ___ (CA 6#99-2472, decided September 7, 2001).

this case raises with decisions by other Circuits[54] — as well as the Sixth Circuit's own decision in *Dick v Scroggy*[55] — concerning the application of a "*per se*"standard under the Sixth Amendment, appears to require intervention by this Court in order to resolve the apparent disagreement.

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[54] *See, eg, Vines* v *United States*, 28 F3d 1123, 1127-1132 (CA 11, 1994)(Counsel's temporary absence during a *testimonial* portion of trial did not constitute a denial of counsel); *Blanco* v *Singletary*, 943 F 2d 1477, 1497 (CA 11, 1991)(Noting that "brief lapse in representation by counsel does not constitute a total absence of counsel"). *See also, Cole* v *United States*, 162 F3d 957 (CA 2, 1998); *Kieser* v *New York*, 56 F3d 16 (CA 2, 1995); *Reese* v *Peters*, 926 F2d 668 (CA 7, 1991)(All holding that representation by suspended attorney, or one not licensed in jurisdiction, was not a denial of counsel).

[55] *Dick* v *Scroggy*, 882 F2d 192, 197 (CA 6, 1989).

RELIEF

WHEREFORE, this Court should grant certiorari in this matter.

MICHAEL E. DUGGAN
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training, & Appeals

JEFFREY CAMINSKY (P27258)
Principal Attorney, Appeals
1116 Frank Murphy Hall of Justice
Detroit, Michigan 48226
Phone: 313-224-5846

Dated: August 6, 2003

JC/lw

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Charlie Lee Mitchell,

Petitioner-Appellee, No. 99-1839

v.

Warden Gerald Mason,

Respondent-Appellant.

On Remand from the United States Supreme Court.

No. 98-71338--Arthur J. Tarnow, District Judge.

Decided and Filed: April 7, 2003

Before: DAUGHTREY and MOORE, Circuit Judges;
CARR, District Judge.(*)

MOORE, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. CARR, D. J. (pp. 27-28), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. Petitioner-Appellee Charlie Lee Mitchell ("Mitchell") was convicted in a Michigan state court of second-degree murder and sentenced to a term of ten to fifteen years' imprisonment. Throughout his six-month confinement in custody awaiting trial, Mitchell sought to have new counsel appointed to his case because he claimed that his court-appointed lawyer refused to meet with him. Mitchell's motion to replace his counsel was addressed by the state trial court on the second day of jury selection and was subsequently denied. Mitchell's claim of ineffective assistance of counsel was rejected in his direct appeals in the Michigan courts, but the federal district court in the Eastern District of Michigan granted Mitchell's habeas petition on the ineffective assistance claim. We affirmed, *Mitchell v. Mason*, 257 F.3d 554 (6th Cir. 2001), but the Supreme Court vacated our decision and remanded the case for our further consideration in light of *Bell v. Cone*, 535 U.S. 685, 122 S. Ct. 1843 (2002). Although *Bell* changes our analysis, it does not change our conclusion that Mitchell was denied the effective assistance of counsel, and we **AFFIRM** the district court.

I. BACKGROUND

Charlie Lee Mitchell was arrested and charged with first-degree murder for the death of Raymond Harlin, who was killed after a fight broke out in Mitchell's kitchen on October 3, 1988. On October 6, 1988, Gerald K. Evelyn was appointed counsel for Mitchell. Evelyn represented Mitchell at a preliminary examination on October 14, 1988, during which he called one witness and argued against the denial of bail. Evelyn next represented Mitchell, close to four months later, at the final conference on February 3, 1989. On April 5, 1989, Evelyn was suspended from practicing law in the State of Michigan.(1) He was reinstated on May 8, 1989, the day jury selection began for Mitchell's trial.

At Mitchell's trial, Evelyn did not present an opening argument. Mitchell did not testify, nor did Evelyn present any witnesses on Mitchell's behalf. At the close of the prosecution's case, Evelyn moved for a directed verdict. The court partially granted the motion by reducing the charge to second-degree murder. During closing arguments, Evelyn argued that Thompson's testimony was equivocal and that the prosecution had not carried its burden of proof. The jury convicted Mitchell of second-degree murder on May 17, 1989. Mitchell was sentenced by the trial judge to ten to twelve years' imprisonment and then resentenced to ten to fifteen years' imprisonment due to a miscalculation in his original sentence.

Prior to the trial, Mitchell wrote six separate letters to the trial judge, the chief judge, and others requesting new counsel. Mitchell alleged that Evelyn had not visited him once in prison nor had Mitchell had the opportunity to speak with his lawyer in court. On April 27, 1989, eleven days before jury selection was to begin, the trial court held a hearing on Mitchell's "Motion for Withdrawal of Counsel" at which Mitchell appeared on his own behalf. Evelyn did not appear for the hearing, although he had notice of it. At the hearing, Mitchell informed the court that he had received a letter from his counsel informing him that he was suspended for a month. He also asked for a new lawyer and a postponement of the trial to afford a new lawyer the chance to review his case. Because Evelyn was not present, the trial court held the motion on advisement.

On the second day of jury selection, May 9, 1989, Mitchell again renewed his motion for new counsel. At that point, Evelyn, who had been reinstated the day before, informed the court that Mitchell wanted him removed because he had failed to visit him the night before in prison as promised. The district court denied Mitchell's motion without prejudice.

On May 15, 1989, the sixth day of trial, Evelyn informed the court that he had received a grievance letter filed by Mitchell with the Attorney Grievance Commission on May 1, 1989. He then offered to have himself removed from the case. In response to questions from the court, Mitchell then stated, "I would like to, you know, cancel that grievance, you know, because all the motions and everything that I requested have been answered. . . . I'm satisfied, your Honor." J.A. at 192.

On direct appeal, Mitchell was granted an evidentiary hearing, known as a *Ginther* hearing, on the effective assistance of his trial counsel. *See People v. Ginther*, 212 N.W.2d 922 (Mich. 1973). At the hearing, which occurred before the same judge who presided over the trial, Mitchell presented the testimony of four witnesses, including Mitchell's mother. Mitchell himself also testified. Mitchell's appellate counsel did not call his trial counsel, Evelyn, to the stand. Appellate counsel introduced two witnesses who had been present at Mitchell's apartment on the night of Harlin's murder to establish that they were material witnesses and that Evelyn neither contacted them nor called them to testify at trial. Mrs. Mitchell's testimony was offered to establish her numerous efforts to contact Evelyn and to inform him that there were other witnesses whom he should interview. Mitchell also testified to his efforts to contact Evelyn and discuss his case with his lawyer. After the hearing, the trial judge found that Mitchell had not demonstrated objective unreasonableness or prejudice as required by state law and that he had received effective assistance of counsel.

The Michigan Court of Appeals, *see People v. Mitchell*, No. 118832 (Mich. Ct. App. Jan. 5, 1994), and the Michigan Supreme Court, *see People v. Mitchell*, 560 N.W.2d 600, 602 (Mich. 1997), affirmed Mitchell's conviction. On Mitchell's ineffective assistance of counsel claims, the Michigan Supreme Court first found that Evelyn's suspension did not constitute a "per se" denial of counsel during a critical stage of the proceedings under *United States v. Cronic*, 466 U.S. 648 (1984). That court rejected Mitchell's contention that his case warranted a presumptive finding of ineffectiveness under the Sixth Amendment, concluding that Mitchell's claim presented neither a circumstance in which it was unlikely that any lawyer could provide effective assistance of counsel, a constructive denial of counsel, nor an unconstitutional failure to grant a continuance. *See Mitchell*, 560 N.W.2d at 607-08. The Michigan Supreme Court thus analyzed Mitchell's claims under the *Strickland v. Washington*, 466 U.S. 668 (1984), standard for ineffective assistance of counsel which requires deficient performance and a showing of prejudice, and it found that because Mitchell had not adequately developed a record at the *Ginther* hearing "regarding what Mr. Evelyn did or did not do, or whether Mr. Evelyn knew of the alleged eyewitnesses," there was "no factual basis for a conclusion that counsel's performance was constitutionally deficient." *Mitchell*, 560 N.W.2d at 609. The court concluded that "[a]n inference of constitutional ineffectiveness cannot be established on the basis of the 'circumstance' of counsel's thirty-day suspension during seven months of representation, without any inquiry into the conduct of the trial or any record being developed regarding counsel's actual preparedness and its effect on the result." *Id.* at 613.

Two Justices dissented, finding that Evelyn's performance was "per se" ineffective under *United States v. Cronic*, 466 U.S. 648 (1984), and *Geders v. United States*, 425 U.S. 80

(1976), because of a confluence of factors including Evelyn's suspension, which rendered him completely unavailable for thirty days during the critical stage of pre-trial investigation; the fact that Evelyn failed to hold a private meeting with the defendant during the seven-month period of his representation; and the gravity of the first-degree murder charge against Mitchell. *See Mitchell*, 560 N.W.2d at 621-22. The dissent concluded that the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance of counsel that Mitchell was constructively denied counsel.(2)

On March 25, 1998, Mitchell filed a petition for habeas corpus relief with the district court under 28 U.S.C. §§ 2254, asserting that he was denied his right to the effective assistance of counsel. The district court granted Mitchell's petition, and on July 12, 2001, we affirmed, reasoning that because Mitchell was constructively denied the assistance of counsel during the critical pre-trial period, the state courts' refusal to grant him relief was an unreasonable application of *United States v. Cronic*, 466 U.S. 648 (1984). After the Supreme Court decided *Bell v. Cone*, 535 U.S. 685, 122 S. Ct. 1843 (2002), which further explicated the line between claims based on *United States v. Cronic* and claims based on *Strickland v. Washington*, 466 U.S. 668 (1984), the Court vacated our decision in this case and remanded the case to us for further consideration in light of *Bell*. *Mason v. Mitchell*, __ U.S. __, 122 S. Ct. 2354 (2002). Upon careful consideration, we affirm the district court.

II. ANALYSIS

A. Standard of Review

Whether the district court properly granted the writ of habeas corpus is a question of law that we review de novo. *Doan v. Brigano*, 237 F.3d 722, 729 (6th Cir. 2001). The

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), which amended 28 U.S.C. §§ 2254, applies to all habeas petitions filed after April 24, 1996, the effective date of the Act. Because Mitchell's petition for habeas was filed after the effective date, AEDPA governs our review of this case.

Pursuant to AEDPA, a writ of habeas corpus may "not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

> (1)resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2)resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §§ 2254(d). The federal court must presume that all determinations of factual issues made by the state court are correct unless the defendant can rebut that presumption by clear and convincing evidence. *See* 28 U.S.C. §§ 2254(e)(1).

The question whether Mitchell was deprived of his right to effective assistance of counsel is a mixed question of law and fact. *Olden v. United States*, 224 F.3d 561, 565 (6th Cir. 2000). In a habeas case, we apply the "unreasonable application" prong of §§ 2254(d)(1) to a mixed question of law and fact. *Harpster v. Ohio*, 128 F.3d 322, 327 (6th Cir. 1997). In *Terry Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court elaborated upon the independent meaning conveyed by the "contrary to" and "unreasonable application of" clauses of the statute, as well as the distinct analysis to be performed under each clause. *Williams*, 529

U.S. at 410. According to the Court, a federal habeas court may find that the state court decision resulted in an "unreasonable application of" clearly established Federal law if "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The Supreme Court cautioned that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. The *Williams* decision also clarified that in our review of the state court's judgment, we may only look to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state-court decision to determine whether the state court unreasonably applied clearly established federal law. *See id.* at 412.

With these guidelines in mind, we turn to the question whether the district court properly granted Mitchell's petition for habeas corpus relief.

B. Procedural Default

As we did in our first opinion, we must address the Warden's initial argument that the district court erred by evaluating Mitchell's ineffective assistance of trial counsel claim instead of rejecting it as procedurally defaulted in state court. Warden Mason asserts that under Michigan law, when the effectiveness of a lawyer's representation is challenged, the lawyer must be called as a witness to testify at the *Ginther* hearing in order to create the proper evidentiary record. According to the Warden, Mitchell's failure to call his trial counsel at the *Ginther* hearing violated this state procedural rule. Therefore, Mitchell was unable to establish the necessary factual record from which that court could evaluate his claim. The Warden asserts that the Michigan Supreme Court relied on this state procedural rule to deny Mitchell relief.

When the state argues that a petitioner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review is barred unless the petitioner can show cause for the default and actual prejudice as a result of the alleged violation of federal law. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). For the doctrine of procedural default to bar federal review, however, a firmly established and regularly followed state procedural rule applicable to the petitioner's claim must exist, and the petitioner must have failed to comply with that rule. *See Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (explaining that an adequate and independent state procedural bar to the consideration of "constitutional claims must have been 'firmly established and regularly followed' by the time as of which it is to be applied") (citing *James v. Kentucky*, 466 U.S. 341, 348 (1984)). We have jurisdiction to review the petitioner's federal claim unless the last state court from which the petitioner sought review clearly and expressly invoked a firmly established state procedural rule as a basis for its decision to reject review of the petitioner's federal claim. *Coleman*, 501 U.S. at 735.

Based on our review of Michigan case law, we conclude that there was no well-established state procedural rule as of the time that Mitchell's claim was reviewed that barred appellate review in the absence of trial counsel's testimony at a *Ginther* hearing. At oral argument before this court, counsel for the Warden first pointed us to this very case, *People v. Mitchell*, 560 N.W.2d 600 (Mich. 1997), as evidence that Michigan has a firmly established procedural rule requiring the defendant to call defense counsel at a *Ginther* hearing or risk procedurally defaulting the claim. Of course, citing to the very case under review is useless because it is the Warden's burden to demonstrate that the rule was *already* firmly established and regularly followed as of the time the state court invoked the rule. *See Ford*, 498 U.S. at 423-24. Counsel for the Warden then cited to a one-paragraph order in another case granting a *Ginther* hearing, *People v. Williams*, 391 Mich. 832 (1974), to support his contention. This single, one-paragraph order is utterly insufficient to demonstrate the existence of a state procedural rule so "firmly established and regularly followed" that it may bar a petitioner's federal constitutional claim on collateral review. *Ford*, 498 U.S. at 423-24 (quoting *James*, 466 U.S. at 348).

When there has been no motion for a new trial or a *Ginther* hearing, the case law reveals that a Michigan reviewing court *will* consider claims of ineffective assistance of counsel but will be forced to limit itself to examining the trial record for errors, as no other record has been developed.(3) Thus, while *Ginther* and its progeny indicate that it is crucial to develop an adequate record of trial counsel's failures if petitioner's claim is to succeed, we believe that those Michigan courts that have rejected ineffective assistance of counsel claims have done so on the merits of the claim and not due to a procedural default.(4) Because we conclude that there was no firmly established and regularly followed state procedural rule to bar Mitchell's ineffective assistance claim when the Michigan Supreme Court reviewed this case, the district court did not err in considering the claim and we need not engage in a cause-and-prejudice analysis before reaching the substance of Mitchell's claim.

C. Application of AEDPA

The threshold question under AEDPA is whether Mitchell seeks to apply a rule of law that was clearly established at the time his state court conviction became final. *Williams*, 529 U.S. at 390. There is no doubt that the rule of law that Mitchell seeks to apply -- the "per se" ineffective assistance of counsel rule -- was clearly established by the Supreme Court in *United States v. Cronic*, 466 U.S. 648 (1984). In *Cronic*, the Supreme Court held that an appeals court must reverse a criminal defendant's conviction "without any specific showing of prejudice to defendant when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 U.S. at 659 n.25. In other words, when counsel is totally absent during a critical stage of the proceedings, prejudice must be presumed. In *Williams*, the Supreme Court confirmed the vitality of this "per se" approach, noting that while the *Strickland v. Washington*, 488 U.S. 668 (1984), test for ineffective assistance of counsel, requiring proof of deficient performance and prejudice, provides guidance for resolving virtually all ineffective assistance of counsel claims, there are "a few situations in which prejudice may be presumed." *Williams*, 529 U.S. at 391 (citing *Strickland*, 466 U.S. at 692). We have recently applied the presumption-of-prejudice test to a claim of ineffective assistance of counsel. *Olden*, 224 F.3d at 568 (prejudice is presumed when counsel is absent during prosecution's presentation of evidence that implicates defendant because such absence occurred during "critical stage" of trial). Thus, we easily reach the conclusion that it was clearly established by the Supreme Court, as of the time that Mitchell's case was decided in state court, that the "complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice." *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (citing *Cronic*, 488 U.S. at 659).

Because there is clearly established law applicable to Mitchell's claim, the next question we must address is whether the Michigan Supreme Court's decision rejecting Mitchell's ineffective assistance claim was "an unreasonable application of" that established law or was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1)-(2). The Warden correctly argues that the district court failed to review the Michigan Supreme Court findings under the deferential standard of review mandated by AEDPA. The district court's order did not determine whether the Michigan Supreme Court's analysis was objectively unreasonable; instead, it essentially reviewed Mitchell's claims de novo. We must now, therefore, conduct the appropriate review of the Michigan Supreme Court's decision.

D. Mitchell's Ineffective Assistance of Counsel Claim

Although the Michigan Supreme Court properly acknowledged Supreme Court precedent by noting that "[t]he right to counsel extends to representation during any 'critical stage' of the proceedings," it then concluded that the right to counsel "does not require the state to provide the defendant with unlimited access to the attorney during the trial" and that "[a] fortiori, it does not guarantee a defendant 'a private in-depth interview' during pretrial in the place of the defendant's choosing." *Mitchell*, 560 N.W.2d at 605 n.9 (internal citations omitted).

Framing this case as one about "allegations of inadequate preparation," the Michigan Supreme Court declined to apply a per se prejudice analysis to Mitchell's claim after rejecting the suggestion that Mitchell's case presented circumstances that made it unlikely that any lawyer could provide effective representation, that Mitchell was constructively denied counsel, or that he was denied counsel combined with a failure to grant a continuance. *See id.* at 607. The Michigan Supreme Court rejected these theories in inverse order. Relying on *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983), for the proposition that "[n]ot every restriction on counsel's . . . opportunity to investigate . . . or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel," the Michigan Supreme Court determined that it was not error for the state trial court to deny Mitchell's request for a continuance so that he could consult with his lawyer prior to trial. *Mitchell*, 560 N.W.2d at 607 (quoting *Morris*, 461 U.S. at 11-12). Pointing to *United States v. Cronic*, 466 U.S. 648 (1984), the Michigan Supreme Court then held that Evelyn's thirty-day suspension did not constitute a constructive denial of counsel. Moreover, the Michigan Supreme Court declared, a claim of ineffective assistance of counsel "stemming from a thirty-day suspension coupled with six-months time for preparation" does not, pursuant to *Cronic*, create a circumstance making it so unlikely that any lawyer could provide the defendant with constitutionally effective assistance. *See Mitchell*, 560 N.W.2d at 609.

The Michigan Supreme Court then evaluated Evelyn's performance to determine whether it was deficient under the familiar two-part *Strickland* standard and concluded it was not. *Id.* The court first stated that there was no factual basis for concluding that Evelyn's performance was constitutionally inadequate. *See id.* at 609-10. The court then performed the first part of the *Strickland* analysis based on the record before it and determined that Evelyn's performance met constitutional muster. *See id.* at 610-11.

After a thorough review of the record, we are convinced that the undisputed amount of time that Evelyn spent with Mitchell prior to jury selection and the start of trial -- approximately six minutes spanning three separate meetings in the bullpen, when viewed in light of Evelyn's month-long suspension from practice immediately prior to trial -- constituted a complete denial of counsel at a critical stage of the proceedings. The Michigan Supreme Court's evaluation of Mitchell's ineffective assistance claim under the *Cronic* standard for per se prejudice reflects a misunderstanding and misapplication of that Supreme Court precedent. We conclude that, in insisting on evaluating Mitchell's claim under the *Strickland* standard for ineffective assistance of counsel, the Michigan Supreme Court erroneously and unreasonably applied clearly established Supreme Court law set forth in *Cronic*.

E. Constructive Denial of Counsel

In *Bell v. Cone*, 535 U.S. 685, 122 S. Ct. 1843 (2002), the Supreme Court defined the differences between claims governed by *Strickland* and claims governed by *Cronic*. If a claim is governed by *Strickland*, a defendant must typically demonstrate that specific errors made by trial counsel affected the ability of the defendant to receive a fair trial. If a claim is governed by *Cronic*, however, the defendant need not demonstrate any prejudice resulting from the lack of effective counsel; in some cases, the Sixth Amendment violations are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. Three types of cases warrant *Cronic*'s presumption-of-prejudice analysis. The first is the complete denial of counsel, in which "the accused is denied the presence of counsel at 'a critical stage.'" *Bell*, 122 S. Ct. at 1851 (quoting *Cronic*, 466 U.S. at 659). The second is when counsel "'entirely fails to subject the prosecution's case to meaningful adversarial testing.'" *Id.* (quoting *Cronic*, 466 U.S. at 659). The third is when counsel is placed in circumstances in which competent counsel very likely could not render assistance. *Id.*

Because Mitchell was denied the presence of counsel during the critical pre-trial stage, Mitchell's claim should be reviewed under *Cronic*. On its way to analyzing Mitchell's claim under *Strickland*, the Michigan Supreme Court erred by focusing solely on the thirty-day period immediately preceding trial in which Mitchell's counsel was suspended from practicing law. Framing the issue as entirely an issue of preparation time, the state court interpreted Mitchell's challenge as a challenge to one particular aspect of the defense and analyzed the claim under *Strickland*. If this thirty-day period were the only issue, it might have been proper to apply the *Strickland* analysis, for as *Bell* notes, counsel's failure in particular instances is evaluated under *Strickland*. *See Bell*, 122 S. Ct. at 1851-52. However, the absence of counsel extended throughout the pre-trial period; not only was Mitchell's counsel suspended from the practice of law for the month immediately preceding trial, but Mitchell's counsel also met with Mitchell for no more than six minutes over the seven-month period before trial, and the trial court repeatedly ignored Mitchell's entreaties for counsel who would properly prepare a defense.

In analyzing this case under §§ 2254, we note that this is one of those cases in which, as the *Williams* Court described, it is "difficult to distinguish a decision involving an unreasonable extension of a legal principle," which would warrant relief under §§ 2254's "unreasonable application" provision, "from a decision that arrives at a conclusion opposite to that reached by this Court on a question of law," which would warrant relief under §§ 2254's "contrary to" provision. *See Williams*, 529 U.S. at 408 (quotation omitted). That is, despite the Supreme Court's instruction that questions of law are governed by the "contrary to" provision and questions involving the application of law to facts are governed by the "unreasonable application" provision, it is unclear whether a case such as this one is better categorized as involving an unreasonable extension of *Strickland* to the facts at hand or an incorrect choice of law in refusing to apply *Cronic*. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 233-35 (1985) (describing questions of law, questions of fact, and mixed questions of the application of law to fact as not admitting of clear distinctions). Regardless, as the Court did in *Williams*, we decline to resolve this question, for, as in *Williams*, the state court's decision is both contrary to and involves an unreasonable application of Supreme Court precedent. *Williams*, 529 U.S. at 391.

In *Bell*, the Supreme Court identified "critical stage[s]" by looking to previous cases in which it had so characterized various stages of criminal proceedings. By this reasoning, the pre-trial period is indeed a critical stage, the denial of counsel during which supports a *Cronic* analysis. Several of the Supreme Court's cases demonstrate that the period between appointment of counsel and the start of trial is indeed a "critical stage" for Sixth Amendment purposes. The Supreme Court in *Powell v. Alabama*, 287 U.S. 45, 57 (1932), described the pre-trial period as "perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important." The Court ruled that a defendant must be provided counsel at "every step in the proceedings against him," which the *Powell* ruling suggests includes the pre-trial period at issue here. *Id.* at 69.

Bell confirms that the "critical stage[s]" at which counsel must be present are not limited to formal appearances before a judge. That is, although a defendant may not have a right to consult with counsel while the defendant is testifying, "[h]e has an absolute right to such consultation before he begins to testify." *Perry v. Leeke*, 488 U.S. 272, 281 (1989). The *Bell* Court cites *Geders v. United States*, 425 U.S. 80, 91 (1976), in which a defendant was not allowed to access counsel during a seventeen-hour overnight recess, as an example of the denial of counsel at a critical stage for *Cronic* purposes. *See Bell*, 122 S. Ct. at 1851 n.3. The recess was important, according to *Geders*, because "[s]uch recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier." *Geders*, 425 U.S. at 88. *Bell*'s reliance on both *Powell, see Bell*, 122 S. Ct. at 1851, and *Geders, see id.* at 1851 n.3, confirms that "a critical stage" includes pre-trial preparation.

The pre-trial period constitutes a "critical period" because it encompasses counsel's constitutionally imposed duty to investigate the case. In *Strickland*, the Supreme Court explicitly found that trial counsel has a "duty to investigate" and that to discharge that duty, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. The Supreme Court also recognized that without pre-trial consultation with the defendant, trial counsel cannot fulfill his or her duty to investigate. The Court stated that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* The Court went on to emphasize further the significance of the defendant's input into trial counsel's investigation:

> In particular, what investigation decisions are reasonable depends critically on such information [provided by defendant]. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of

> counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Id. Because the Supreme Court has repeatedly made clear that there is a duty incumbent on trial counsel to conduct pre-trial investigation, it necessarily follows that trial counsel cannot discharge this duty if he or she fails to consult with his or her client.(5)

Unlike the defense counsel in *Morris v. Slappy*, 461 U.S. 1 (1983), and *Dick v. Scroggy*, 882 F.2d 192 (6th Cir. 1989), defense counsel here utterly failed his client during the critical pre-trial period. In *Slappy*, the Supreme Court rejected an ineffective assistance claim based on a public defender who became ill and was replaced prior to trial. The Court in *Slappy* pointed out that the replacement counsel had read all of the relevant transcripts, obtained and reviewed all of the relevant materials, and had met with the defendant several times for extended interviews. *See Slappy*, 461 U.S. at 5-7. Indeed, counsel in *Slappy* repeatedly assured the trial court that he was prepared to try the case based on his conferences with the defendant and the study he had made of the investigation. *Id.* at 6-7. Similarly, in *Scroggy*, the defendant's ineffective assistance claim was rejected because counsel had, in fact, interviewed the defendant in a thirty- to forty-five-minute meeting. *See Scroggy*, 882 F.2d at 197. Neither of these cases gives guidance here, however, because although it is true that "[n]ot every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel," *Slappy*, 461 U.S. at 11, in this case, no effort to consult with the client was made.

The Sixth Amendment guarantees more than a pro forma encounter between the accused and his counsel, and six minutes of consultations spread over three meetings do not satisfy its requirements. "Assistance begins with the appointment of counsel, it does not end there." *Cronic*, 466 U.S. at 654 n.11. When counsel is appointed but never consults with his client and is suspended from practicing law for the month preceding trial, and the court acquiesces in this constructive denial of counsel by ignoring the defendant's repeated requests for assistance, *Cronic* governs. The Michigan Supreme Court's decision was both contrary to and an unreasonable application of Supreme Court precedent. *See Williams*, 529 U.S. at 407.

F. Mitchell's Pre-Trial Contact With His Attorney

Finally, the Warden argues that the district court based its decisions on factual findings specifically rejected by the state courts in violation of §§ 2254(e)(1), which requires a habeas court to presume that all factual findings made by a state court are correct absent clear and convincing evidence to the contrary. *See* 28 U.S.C. §§ 2254(e)(1). However, the presumption of correctness that protects state court findings of fact does not extend to the Michigan Supreme Court's legal conclusion that Mitchell was not without counsel at a critical stage of the proceedings. Thus, the Michigan Supreme Court's pronouncement that "[t]here is no factual basis for a conclusion that counsel's performance was constitutionally deficient," *Mitchell*, 560 N.W.2d at 609, is not due the deference accorded to a pure finding of fact, as this statement encompasses a mixed question of law and fact, which we review de novo. Indeed, our conclusion is dictated by our application of law to facts in the state court record, which is properly governed by §§ 2254(d)(1).

Although the Michigan Supreme Court stated that "[n]o record was made regarding what Mr. Evelyn did or did not do," *Mitchell*, 560 N.W.2d at 609, that court noted that Mitchell "wrote six letters to the trial judge, the chief judge and others requesting removal of counsel," *id.* at 603. These letters, which were part of the record before the Michigan

Supreme Court, document Mitchell's unsuccessful efforts to contact his attorney. For example, on February 8, 1989, Mitchell wrote to the court:

> I have been locked up for 5 months and not once have my lawyer took time out to talk to me....3 times after I went to court my lawyer has told me that he would be over to talk to me, but never did.....Every since my second month of being incarcerated I have had my mother go over to his office concerning an evidentiary hearing, she have been at his office many times, she has wrote many letters but he has never replied to her....I know I'm charged for something I haven't done, but I know that if I can't express to Gerald K. Evelyn what happen on the night this incentdent occurd he will not know the best stradagy of what and how to fight this case....For 5 months I have waited patiently, I have tryed every way I can to get him to talk to me, I am tired of being in the dark and knowing he's in the dark....So your honor Please take him off my case because he's not representing me at all.

J.A. at 108a - 108b (Handwritten Letter from Mitchell). No one responded to his letters until eleven days before the start of the trial.

On April 27, 1989, the trial judge convened a hearing to discuss Mitchell's motion for appointment of new counsel. At the hearing, Mitchell informed the trial court that he had received a letter stating that Evelyn had been suspended from the practice of law; it does not appear that the trial court was even aware that Evelyn had been suspended. Evelyn did not attend this hearing, presumably because he was suspended from practice at this point. The trial judge postponed a decision on Mitchell's motion until Evelyn was able to be present.

On May 9, 1989, the second day of jury selection, the trial court revisited the issue of Mitchell's request for new counsel. Evelyn was present at this time. At this hearing. Mitchell stated to the court:

> Well, from the very beginning, you know, Mr. Evelyn promised to talk with me. He has failed to talk with me on every occasion that he promised. He has failed to make any motions for me, and he's failed to talk with my mother, which she has written many letters and calls, and went to his office, also, left word with his secretary. And he also showed up an hour late on my final conference and by him letting me know yesterday that he was going to come over and talk with me and by him failing to do that, I just, I just feel it's just incompetent.

J.A. at 174. When the court asked: "[n]ow, in those letters, it was a question of his not keeping appointments, or seeing you as many times as you'd like to be seen in the jail; is that right?" Mitchell then replied: "Yes. *Never seeing me at all.*" J.A. at 174 (emphasis added). He further asserted that "[t]he only time I meet him is in the courtroom, or brief discussion in the bullpen with plenty of other people in the bullpen. I just don't see how courts can say that that's true fairness." J.A. at 187. Mitchell, who is hard of hearing, also claimed that because he was not wearing his hearing aid in the bullpen, he could not hear half of what his lawyer was saying to him. J.A. at 184. At one point, Mitchell asked, "[H]ow can I make it all the way to trial when Mr. Evelyn has never heard my true side of the story." J.A. at 185-86.

Evelyn testified at length during this hearing. While he made the argument that he had delivered discovery materials to Mitchell and was in the process of working out a deal with the prosecutor to suppress certain evidence on the eve of trial, he never disputed the substance of Mitchell's allegations. At one point he did claim, "I talked to him [Mitchell] prior to the [pre-trial] examination, your Honor. He's leaving one visit out at least. We have talked on numerous occasions." J.A. at 186. This non-responsive statement, however, is conclusive only of the fact that he and Mitchell had met in the courtroom bullpen before court appearances, which Mitchell acknowledged. Notably, when presented with the opportunity to clear the record before the trial court judge, Evelyn never disputed the substance of Mitchell's assertions regarding the content of their communications.

At the *Ginther* hearing, Mitchell also testified about the nature of his contact with Evelyn prior to the trial. His testimony at this hearing is consistent with the substance of the letter he wrote to the trial court as well as his testimony before the trial court during jury selection.

> Q:Who was your attorney for this case?
>
> A:Attorney Gerald Evelyn.
>
> Q:Do you recall when you saw this person in relation to the preliminary examination?
>
> A:I recall seeing him sitting in the courtroom, the first time I met him.
>
> Q:At the preliminary examination?
>
> A:Yes.
>
> Q:And, how much contact with him did you have before the preliminary examination?
>
> A:None.

***

> Q:When did you next see your attorney?
>
> A:Well, I would see him in the bullpen behind the

> courtroom, maybe about three times -- three different proceedings.
>
> Q:And, those were later proceedings in Recorder's Court?
>
> A:Yes.
>
> Q:And, roughly, would you say how much contact did you have with him before the court proceedings?
>
> A:*One or two minutes.*

***

> Q:Did you see Mr. Evelyn at the Wayne County Jail before your trial in this case?
>
> A:No. I never did.
>
> Q:When was the first time you saw him in the jail, if at all?
>
> A:The second date -- I mean the first day of picking out the jury.

***

> Q:Before your trial started, in the weeks or months leading up to it, did you contact, or attempt to contact your attorney?
>
> A:Yes, I did. I wrote him letters. They wouldn't accept telephone calls.

J.A. at 151-53 (emphasis added).

The fact that Mitchell's counsel was suspended from the practice of law for the thirty days prior to trial does not decide this case, but it does contribute to the weight of the evidence that demonstrates that there was no consultation between Mitchell and his attorney prior to trial. The Michigan Supreme Court found that Mitchell was never unrepresented during any critical stage of the proceedings. According to that court, because Evelyn's law partner assumed responsibility for Evelyn's cases during his suspension, "there was no period of time when the defendant was not represented." *Mitchell*, 560 N.W.2d at 609 n.15. The Michigan Supreme Court's presumption that Mitchell was continuously represented is directly contradicted by the record. In a letter sent to Mitchell on April 10, 1989 informing him of his suspension, Evelyn advised Mitchell: "You may wish to seek legal advice elsewhere and, in the event you choose to do so, you may either pick-up your file or have your new attorney pick-up your file. You may, should you choose to do so, have your case maintained by our law firm; *in which case, you must expressly indicate same in writing*." J.A. at 108c (emphasis added). The letter then states: "[S]hould you have any questions or concerns, please do not hesitate to contact Myzell Sowell," Evelyn's law partner. *Id.* The record does not indicate that Mitchell retained Evelyn's law partner, nor does it indicate that he in any way consented to a substitution in counsel. Moreover, we note that no counsel appeared on Mitchell's behalf at the April 11, 1989 hearing before the trial court, which was conducted during Evelyn's suspension, on Mitchell's motion for new counsel. Thus, we conclude that, despite the Michigan Supreme Court's finding, there is clear and convincing evidence that Mitchell was completely unrepresented for the last thirty days prior to his trial.

The Michigan Supreme Court held that, even if it were to find the defendant and his mother credible and assume that Evelyn never contacted witnesses and only met with the defendant three times, it would not find a denial of counsel at a critical stage. *Mitchell*, 560 N.W.2d at 609 n.15.

Instead, the Michigan Supreme Court found that the allegations of trial counsel's deficient performance would have to meet the *Strickland* standard of deficient performance and prejudice. *Strickland*, however, applies great deference to decisions by defense attorneys out of concern that a rigid set of guidelines or rules would "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689. The defendant bears the burden of proving counsel's ineffectiveness out of deference for counsel's decisions and trial strategy. *See id.* The illogic of applying *Strickland* to these facts is manifest in that there are no conceivable tactical or strategic reasons for defense counsel to fail to consult with a client prior to trial. Such a meeting is vital if counsel is competently to develop a defense. If counsel does not meet with his client for more than two minutes at a time, the defendant is unable to confide truthfully in his lawyer and counsel will not know, for example, which investigative leads to pursue, whether there are witnesses for the defense, or what kind of alibi the defendant may have.(6)

In *Cronic*, the Supreme Court delineated those few exceptional circumstances that are so likely to prejudice the defendant that a reviewing court need not examine the consequences of the lawyer's conduct; one of these circumstances is the complete denial of counsel to a criminal defendant at a critical stage of the proceedings. *Cronic*, 466 U.S. at 659. In this case, we have demonstrated that, according to Supreme Court precedent, we must consider the pre-trial period "critical" for purposes of the Sixth Amendment. Although Mitchell alleged that his counsel's performance during trial was inadequate, he also alleged that his counsel was utterly absent during the seven-month period prior to trial. Because Mitchell's latter claim alleges his counsel's total absence during a critical period, the Michigan Supreme Court should have applied *Cronic*, rather than *Strickland*, to his claim.(7)

III. CONCLUSION

In light of the Michigan Supreme Court's assumption that the pre-trial period, during which investigation and consultation with the defendant must occur, was not a "critical stage" of the proceedings, the Michigan Supreme Court unreasonably applied clearly established Supreme Court precedent to the facts of this case. *See* 28 U.S.C. §§ 2254(d)(1). The Supreme Court has long recognized that there is a duty to investigate before trial and that, by failing to consult with the defendant, counsel cannot perform this duty during a critical stage. The undisputed record evidence demonstrates that Mitchell's counsel never consulted with him and that he was completely unrepresented during the entire month prior to his trial. These are clearly circumstances so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Therefore, the Michigan Supreme Court erred by rejecting the per se prejudice analysis and insisting on evaluating Mitchell's claim through the lens of *Strickland*. For the foregoing reasons, we **AFFIRM** the district court's provisional grant of the writ of habeas corpus.

DISSENT

CARR, District Judge, dissenting. I remain unable to concur in the majority's judgment for the reasons previously expressed in my original dissent. 257 F.3d 554, 574-80. I continue to be of the view that this case, particularly in light of *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914, (2002), is governed by the cause and prejudice standard of *Strickland v. Washington*, 466

U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), rather than the *per se* standard of *U.S. v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). While, unquestionably, the petitioner's attorney failed to consult adequately with the petitioner prior to trial, the record does not support the conclusion that he, as required to grant relief under *Bell* and *Cronic*, "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." 466 U.S. at 659, 104 S.Ct. 2039.

I also remain persuaded that we are bound to abide by the decision of another panel in a case presenting facts that are, in my view, substantially indistinguishable from the facts of this case. *Dick v. Scroggy*, 882 F.2d 192, 197 (6th Cir.1989).

Though my views on the foregoing have been expressed amply in my original dissent, and will not be repeated here, I will repeat the following observation from that opinion, in which I fault the trial court for its inexplicable failure

> to have taken the time before commencing a first degree murder trial to inquire effectively into the circumstances, and to have ensured that the petitioner's counsel was reasonably well prepared to defend his client. The trial court's failure, in the face of the petitioner's unanswered claims of lack of contact with his attorney and the lawyer's eve-of-trial suspension from practice, to grant a short continuance is, in a word, incomprehensible. The compulsion to maintain a tidy docket should never, as it so clearly did here, place fundamental rights at risk. Would a week's delay have really mattered?
>
> The message of this case is not that federal courts are quick to intervene into state proceedings; the message is, rather, that the state trial court in this case could and should have done a better job of

> upholding the Constitution. Had it taken but a few moments to consider the petitioner's complaints meaningfully, or had it postponed the trial for a brief period to make certain that Evelyn was truly ready for trial, this case would not be here. The time the trial court may have saved has led to a great and otherwise unnecessary expenditure of time on the part of the Michigan courts of review, the district court, and this court.

257 F.3d at 580.

Respectfully, I dissent.

Footnotes

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[*] The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

[1] The record does not indicate why Evelyn was suspended.

[2] The dissent noted that while "Evelyn might be a very gifted trial lawyer who knows full well the 'rules of the game,' this cannot excuse the total lack of preparation. Defending a person in a first-degree murder trial is not a game. Effective representation must mean more than showing up and giving a good performance. If truth seeking is to play some role in our criminal justice system, defense attorneys must exert at least some effort to explore the truth so that, if there is exculpatory evidence available in favor of their client, they can present it." *Mitchell*, 560 N.W.2d at 622 n.7.

[3] *See, e.g.*, *People v. Snider*, 608 N.W.2d 502, 517 (Mich. Ct. App. 2000) (holding that where defendant has failed to move for a new trial or an evidentiary hearing, his claim for ineffective assistance of counsel is "largely forfeited" because review is limited to the existing record); *People v. Williams*, 566 N.W.2d 649, 652 (Mich. Ct. App. 1997) ("Because there was no *Ginther* hearing, our review is

limited to mistakes apparent on the record."); *People v. Dixon*, 552 N.W.2d 663, 669 (Mich. Ct. App. 1996) ("Defendant failed to created a testimonial record in the trial court with regard to his claims of ineffective assistance. This failure forecloses appellate review unless the record contains sufficient detail to support defendant's claims.").

[4] In this case, the Michigan Supreme Court determined that, because Evelyn was not called to testify at the *Ginther* hearing, it had "no factual basis for a conclusion that counsel's performance was constitutionally deficient and undermines confidence in the reliability of the verdict." *Mitchell*, 560 N.W.2d at 609. This is a decision on the merits of Mitchell's claims as presented to the court.

[5] This is not, as counsel for the Warden claims, a new rule of law. As our discussion of Supreme Court precedent indicates, the Supreme Court has considered the pre-trial period to be a critical stage of the proceedings since at least 1932, when it handed down *Powell*. A new rule of law "breaks new ground or imposes a new obligation" on the states or the federal government. Alternatively, a court announces a new rule of law "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 300-01 (1989). It cannot seriously be argued that defense counsel's obligation to consult with his client at least once is a new or novel obligation being imposed on the government or that the Supreme Court's cases in *Powell*, *Strickland*, and *Cronic* do not compel this result.

[6] Defense counsel's failure to speak with his client also violates several standards articulated in the ABA Standards for Criminal Justice. For example, the Duty to Keep Client Informed Standard states, "(a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly

comply with reasonable requests for information" and "(b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." ABA Standards for Criminal Justice 4-3.8 (3d ed. 1993).

[7] Finally, although the district court did not comment upon Mitchell's claim that his appellate counsel was constitutionally ineffective, we note that, were we to accept the Warden's argument that a defendant forfeits his ineffective assistance of counsel claim if he fails to call his trial attorney as a witness at the *Ginther* hearing, we do not believe that the appellate counsel's failure to call the trial attorney could be considered reasonable strategy on the facts of this case. It is not strategy for an appellate attorney to ask for a *Ginther* hearing and then to conduct it in such a way as to preclude relief for the defendant.

APPENDIX B

No. 99-1839
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLIE LEE MITCHELL, Petitioner-Appellee,	Filed June 25, 2003
v.	ORDER
GERALD MASON, Respondent-Appellant,	

BEFORE: DAUGHTREY and MOORE, Circuit Judges; and CARR,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel member but also to all other judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

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[*] Hon. James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-1839

Filed: July 7. 2003

CHARLIE LEE MITCHELL
Petitioner-Appellee

v.

GERALD MASON
Respondent-Appellant

MANDATE

Pursuant to the court's disposition that was filed 4/7/03 the mandate for this case hereby issues today.

A True Copy.

COSTS: **NONE**

Attest:

Filing Fee..................$
Printing..................... $
Total..............$

Deputy Clerk

APPENDIX D

Supreme Court of the United States
Gerald **MASON**, Warden, petitioner.
v.
Charlie Lee **MITCHELL**
No. 01-600.
June 10, 2002.

Case below, 257 F.3d 554.

Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari granted. Judgement vacated, and case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Bell v. Cone*, 535 U.S. 685, 122 S. Ct. 1843, 152 L.Ed.2d 914 (2002).

U.S., 2002
Mason v. **Mitchell**
122 S.Ct. 2354 (Mem), 536 U.S. 901, 153 L.Ed.2d 177, 70 USLW 3281, 70 USLW 3752, 70 USLW 3756, 2 Cal. Daily Op. Serv. 5052

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Charlie Lee Mitchell,
Petitioner-Appellee,

v. No. 99-1839

Warden Gerald Mason,

Respondent-Appellant.

Appeal from the United States District Court

for the Eastern District of Michigan at Detroit.

No. 98-71338--Arthur J. Tarnow, District Judge.

Argued: December 1, 2000

Decided and Filed: July 12, 2001

Before: DAUGHTREY and MOORE, Circuit Judges;
CARR, District Judge.(*)

COUNSEL

ARGUED: Jeffrey W. Caminsky, COUNTY OF WAYNE PROSECUTOR'S OFFICE, Detroit, Michigan, for Appellant. Rolf E. Berg, STATE APPELLATE DEFENDER'S OFFICE, Detroit, Michigan, for Appellee. **ON BRIEF:** Jeffrey W. Caminsky, COUNTY OF WAYNE PROSECUTOR'S OFFICE, Detroit, Michigan, for Appellant. Rolf E. Berg, STATE APPELLATE

DEFENDER'S OFFICE, Detroit, Michigan, for Appellee.

MOORE, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. CARR, D. J. (pp. 34-44), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. Petitioner-Appellee Charlie Lee Mitchell ("Mitchell") was convicted in a Michigan state court of second-degree murder and sentenced to a term of ten to fifteen years' imprisonment. Throughout his six-month confinement in custody awaiting trial, Mitchell sought to have new counsel appointed to his case because he claimed that his court-appointed lawyer refused to meet with him. Mitchell's motion to replace his counsel was addressed by the state trial court on the second day of jury selection and was subsequently denied. On direct appeal, Mitchell raised a claim of ineffective assistance of counsel, which was rejected by the Michigan Court of Appeals and then the Michigan Supreme Court. Having exhausted his state remedies, Mitchell filed an application for a writ of habeas corpus in federal district court in the Eastern District of Michigan, which granted Mitchell's habeas petition. We believe that Mitchell's petition for habeas relief must be granted because the Michigan Supreme Court unreasonably applied clearly established Supreme Court precedent in its review of Mitchell's claim. Therefore, we **AFFIRM** the district court's order.

I. JURISDICTION

We have jurisdiction to hear Warden Mason's appeal from the district court's grant of Mitchell's petition for habeas corpus under 28 U.S.C. §§ 2253.

II. BACKGROUND

Charlie Lee Mitchell was arrested and charged with first-degree murder for the death of Raymond Harlin, who was killed after a fight broke out in Mitchell's kitchen on October 3, 1988.(1) On October 6, 1988, Gerald K. Evelyn was appointed counsel for Mitchell. Evelyn represented Mitchell at a preliminary examination on October 14, 1988, during which he called one witness and argued against the denial of bail. Evelyn next represented Mitchell, close to four months later, at the final conference on February 3, 1989. On April 5, 1989, Evelyn was suspended from practicing law in the State of Michigan.(2) He was reinstated on May 8, 1989, the day jury selection began for Mitchell's trial.

According to the facts offered at trial by the prosecution, Mitchell was the leader of a drug-trafficking ring and his Detroit apartment served as a wholesale warehouse for several street-level sellers who sold drugs in the lobby of the building. Harlin, the deceased, allegedly worked for Mitchell as a drug seller. The prosecution's theory was that Mitchell directed the events that took place in his apartment surrounding Harlin's murder. On the night in question, Mitchell, Harlin, co-defendant Antonio Moore, and several others were present in Mitchell's apartment around 10:00 p.m. According to trial testimony, a fight broke out between Moore and Harlin in Mitchell's kitchen.(3) The only reason offered at trial for the start of the fight was that Moore did not like the way Harlin was looking at him.

After the fight began, Tyrone Thompson and another individual arrived. Thompson, who was the prosecution's principal witness, testified that when he arrived at the apartment he saw a gun in plain view on the windowsill and that he took it for fear that Mitchell would use it to shoot Harlin. Thompson also testified that Mitchell said "shoot a hole in his [Harlin's] heart" and thereby ordered the killing. Soon thereafter, co-defendant Lamont Mason and Nehemiah Anderson arrived at the apartment. Mason was another drug seller and Anderson had come to purchase drugs. Thompson testified that by the time Mason and Anderson arrived, he thought the situation had calmed down so he put the gun down. At that point, Mason then picked up the gun and shot Harlin in the neck and back.(4)

Mitchell, Mason, and Moore were all charged with first-degree murder. Separate juries heard Mitchell's and Mason's cases, while Moore opted for a bench trial. Mason, the alleged killer, was acquitted at trial. Moore, who was the primary aggressor in Harlin's beating, received probation for his conviction on felonious assault.

At Mitchell's trial, Evelyn did not present an opening argument. Mitchell did not testify, nor did Evelyn present any witnesses on Mitchell's behalf. At the close of the prosecution's case, Evelyn moved for a directed verdict. The court partially granted the motion by reducing the charge to second-degree murder. During closing arguments, Evelyn argued that Thompson's testimony was equivocal and that the prosecution had not carried its burden of proof. The jury convicted Mitchell of second-degree murder on May 17, 1989. Mitchell was sentenced by the trial judge to ten to twelve years' imprisonment and then resentenced to ten to fifteen years' imprisonment due to a miscalculation in his original sentence.

Prior to the trial, Mitchell wrote six separate letters to the trial judge, the chief judge, and others requesting new counsel. Mitchell alleged that Evelyn had not visited him once in prison nor had he had the opportunity to speak with his lawyer in court. On April 27, 1989, eleven days before jury selection was to begin, the trial court held a hearing on Mitchell's "Motion for Withdrawal of Counsel" at which Mitchell appeared on his own behalf. Evelyn did not appear for the hearing, although he had notice of it. At the hearing, Mitchell informed the court that he had received a letter from his counsel informing him that he was suspended for a month. He also asked for a new lawyer and a postponement of the trial to afford a new lawyer the chance to review his case. Because Evelyn was not present, the trial court held the motion under advisement.

On the second day of jury selection, May 9, 1989, Mitchell again renewed his motion for new counsel. At that point, Evelyn, who had been reinstated the day before, informed the court that Mitchell wanted him removed because he had failed to visit him the night before in prison as promised. The district court denied Mitchell's motion without prejudice.

On May 15, 1989, the sixth day of trial, Evelyn informed the court that he had received a grievance letter filed by Mitchell with the Attorney Grievance Commission on May 1, 1989. He then offered to have himself removed from the case. In response to questions from the court, Mitchell then stated: "I would like to, you know, cancel that grievance, you know, because all the motions and everything that I requested have been answered. . . . I'm satisfied, your Honor." J.A. at 192.

Mitchell filed an appeal as of right in the Michigan Court of Appeals challenging his conviction and sentence. In his appeal, Mitchell raised eight issues, including a claim that the trial court erred by failing to appoint substitute counsel. Mitchell also requested a remand for the purposes of holding an evidentiary hearing, known as a *Ginther* hearing, on the effective assistance of his trial counsel. *See People v. Ginther*, 212 N.W.2d 922 (Mich. 1973). The Court of Appeals remanded to allow Mitchell a *Ginther* hearing.

At the hearing, which occurred before the same judge who had presided over the trial, Mitchell presented the testimony of four witnesses, including Mitchell's mother. Mitchell himself also testified. Mitchell's appellate counsel did not call his trial counsel, Evelyn, to the stand. Appellate counsel introduced two witnesses who had been present at Mitchell's apartment on the night of Harlin's murder to establish that they were material witnesses and that Evelyn neither contacted them nor called them to testify at trial. Mrs. Mitchell's testimony was offered to establish her numerous efforts to contact Evelyn and to inform him that there were other witnesses whom he should interview. Mitchell also testified to his efforts to contact Evelyn and discuss his case with his lawyer. After the hearing, the trial judge found that Mitchell had not demonstrated objective unreasonableness or prejudice as required by state law and that he had received effective assistance of counsel.

The Michigan Court of Appeals upheld Mitchell's conviction in a per curiam decision. *See People v. Mitchell*, No. 118832 (Mich. Ct. App. January 5, 1994). J.A. at 105.

The Michigan Supreme Court granted Mitchell leave to file an appeal on two issues, only one of which is relevant to this case: whether defendant was denied his right to counsel or effective assistance of counsel. On March 25, 1997, the Michigan Supreme Court affirmed Mitchell's conviction: three Justices voted to uphold Mitchell's conviction, two abstained, and two dissented. *People v. Mitchell*, 560 N.W.2d 600, 602 (Mich. 1997). On Mitchell's ineffective assistance of counsel claims, the Michigan Supreme Court first found that Evelyn's suspension did not constitute a "per se" denial of counsel during a critical stage of the proceedings under *United States v. Cronic*, 466 U.S. 648 (1984). That court rejected Mitchell's contention that his case warranted a presumptive finding of ineffectiveness under the Sixth Amendment, concluding that Mitchell's claim presented neither a circumstance in which it was unlikely that any lawyer could provide effective assistance of counsel, a constructive denial of counsel, nor an unconstitutional failure to grant a continuance. *See Mitchell*, 560 N.W.2d at 607-08.

According to the Michigan Supreme Court, Mitchell's claims related to his lawyer's inadequate preparation and were therefore more properly analyzed under the *Strickland v. Washington*, 466 U.S. 668 (1984), standard for ineffective assistance of counsel, which requires deficient performance and a showing of prejudice. The court found that because Mitchell had not adequately developed a record at the *Ginther* hearing "regarding what Mr. Evelyn did or did not do, or whether Mr. Evelyn knew of the alleged eyewitnesses," there was "no factual basis for a conclusion that counsel's performance was constitutionally deficient." *Mitchell*, 560 N.W.2d at 609. Without an adequate record, Evelyn's failure to call the witnesses was presumed to be trial strategy. *Id.* Accordingly, the court found that Mitchell could not prove either element of the *Strickland* test. *Id.* at 610. The court concluded that "[a]n inference of constitutional ineffectiveness cannot be established on the basis of the 'circumstance' of counsel's thirty-day suspension during seven months of representation, without any inquiry into the conduct of the trial or any record being developed regarding counsel's actual preparedness and its effect on the result." *Id.* at 613.

Finally, on Mitchell's ineffective assistance of appellate counsel claim based on appellate counsel's failure to call the trial counsel as a witness at the *Ginther* hearing, the Michigan Supreme Court held that appellate counsel was not ineffective because his decision not to call the trial counsel was "obvious[ly] strategic" and therefore constitutionally sufficient. *Id.*

Two Justices dissented, finding that Evelyn's performance was "per se" ineffective under *United States v. Cronic*, 466 U.S. 648 (1984), and *Geders v. United States*, 425 U.S. 80 (1976), because of a confluence of factors, including: Evelyn's suspension, rendering him completely unavailable for thirty days during the critical stage of pre-trial investigation; the fact that Evelyn failed to hold a private meeting with the defendant during the seven-month period of his representation; and the gravity of the first-degree murder charge against Mitchell. *See Mitchell*, 560 N.W.2d at 621-22. The dissent concluded that the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance of counsel that Mitchell was constructively denied counsel.(5)

On March 25, 1998, Mitchell filed a petition for habeas corpus relief with the district court under 28 U.S.C. §§ 2254. Mitchell asserted three grounds for habeas relief: first, that the trial court violated his right to counsel by failing to appoint new counsel, or grant a continuance, when the judge was informed eleven days prior to trial that counsel had not interviewed him and was suspended from the practice of law up to the start of trial; second, that trial counsel's failure to interview or call three witnesses who would have given favorable testimony constituted ineffective assistance of counsel; and third, that appellate counsel was ineffective.

The state argued in its response that Mitchell had procedurally defaulted his right to challenge the adequacy of his counsel because he failed to call his trial counsel at the *Ginther* hearing and otherwise failed to make an adequate record to support his claims; that the district court was bound by the state court's factual determination that none of the witnesses called at the *Ginther* hearing would have affected the result of the trial and that, without trial counsel's testimony, Mitchell could not rebut these findings; and, finally, that declaring defense counsel ineffective per se for a thirty-day suspension would be a new constitutional rule and thus unavailable to Mitchell.

The district court applied the standard of review the Sixth Circuit had developed in *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999), prior to the Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000). The district court found that the facts indicated that "[f]rom the delivery of discovery materials to Mr. Mitchell until the time of trial, a period of approximately six months, the attorney never communicated with his client." J.A. at 35. Relying on *Geders v. United States*, 425 U.S. 80 (1976), the district court concluded that "[p]retrial preparation is a critical stage of the proceeding" and that "[t]he denial of the opportunity to confer with an attorney results in reversible constitutional error." J.A. at 40. Therefore, the district court concluded that Mitchell had been constructively denied counsel for the purposes of the Sixth Amendment and conditionally granted Mitchell's petition for habeas relief.

Warden Mason appeals from the district court's judgment.

III. ANALYSIS

A. Standard of Review

Whether the district court properly granted the writ of habeas corpus is a question of law that we review de novo. *Doan v. Brigano*, 237 F.3d 722, 729 (6th Cir. 2001). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), which amended 28 U.S.C. §§ 2254, applies to all habeas petitions filed after April 24, 1996, the effective date of the Act. Because Mitchell's petition for habeas was filed after the effective date, AEDPA governs our review of this case.

Pursuant to AEDPA, a writ of habeas corpus may "not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

> (1)resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2)resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §§ 2254(d)(1)-(2). The federal court must presume that all determinations of factual issues made by the state court are correct unless the defendant can rebut that presumption by clear and convincing evidence. *See* 28 U.S.C. §§ 2254(e)(1).

The question whether Mitchell was deprived of his right to effective assistance of counsel is a mixed question of law and fact. *Olden v. United States*, 224 F.3d 561, 565 (6th Cir. 2000). In a habeas case, we apply the "unreasonable application" prong of §§ 2254(d)(1) to a mixed question of law and fact. *Harpster v. Ohio*, 128 F.3d 322, 327 (6th Cir. 1997). In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court elaborated upon the independent meaning conveyed by the "contrary to" and "unreasonable application of" clauses of the statute, as well as the distinct analysis to be performed under each clause. *Williams*, 529 U.S. at 410 (O'Connor, J., concurring). According to the Court, a federal habeas court may find that the state court decision resulted in an "unreasonable application of" clearly established Federal law if "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The Supreme Court cautioned that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. The *Williams* decision also clarified that in our review of the state court's judgment, we may only took to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state-court decision to determine whether the state court unreasonably applied clearly established federal law. *See id.* at 412.

With these guidelines in mind, we turn to the question whether the district court properly granted Mitchell's petition for habeas corpus relief.

B. Procedural Default

Preliminarily, we must address the Warden's first argument that the district court erred by evaluating Mitchell's ineffective assistance of trial counsel claim instead of rejecting it as procedurally defaulted in state court. Warden Mason asserts that under Michigan law, when the effectiveness of a lawyer's representation is challenged, the lawyer must be called as a witness to testify at the *Ginther* hearing in order to create the proper evidentiary record. According to the Warden, Mitchell's failure to call his trial counsel at the *Ginther* hearing violated this state procedural rule. Therefore, Mitchell was unable to establish the necessary factual record from which that court could evaluate his claim. The Warden asserts that the Michigan Supreme Court relied on this state procedural rule to deny Mitchell relief.

When the state argues that a petitioner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review is barred unless the petitioner can show cause for the default and actual prejudice as a result of the alleged violation of federal law. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). For the doctrine of procedural default to bar federal review, however, a firmly established and regularly followed state procedural rule applicable to the petitioner's claim must exist, and the petitioner must have failed to comply with that rule. *See Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (explaining that an adequate and independent state procedural bar to the consideration of "constitutional claims must have been 'firmly established and regularly followed' by the time as of which it is to be applied") (citing *James v. Kentucky*, 466 U.S. 341, 348 (1984)). We have jurisdiction to review the petitioner's federal claim unless the last state court from which the petitioner sought review clearly and expressly invoked a firmly established state procedural rule as a basis for its decision to reject review of the petitioner's federal claim. *Coleman*, 501 U.S. at 735.

Based on our review of Michigan case law, we conclude that there was no well-established state procedural rule as of the time that Mitchell's claim was reviewed which barred appellate review in the absence of trial counsel's testimony at a *Ginther* hearing. At oral argument before this court, counsel for the Warden first pointed us to this very case, *People v. Mitchell*, 560 N.W.2d 600 (Mich. 1997), as evidence that Michigan has a firmly established procedural rule requiring the defendant to call defense counsel at a *Ginther* hearing or risk procedurally defaulting the claim. Of course, citing to the very case under review is useless to counsel because it is his burden to demonstrate that the rule was *already* firmly established and regularly followed as of the time the state court invoked the rule. *See Ford*, 498 U.S. at 423-24. Counsel for the Warden then cited to a one-paragraph order in another case granting a *Ginther* hearing. *People v. Williams*, 391 Mich. 832 (1974), to support his contention. This single, one-paragraph order is utterly insufficient to demonstrate the existence of a state procedural rule so "firmly established and regularly followed" that it may bar a petitioner's federal constitutional claim on collateral review. *Ford*, 498 U.S. at 423-24 (quoting *James*, 466 U.S. at 348).

When there has been no motion for a new trial or a *Ginther* hearing, the case law reveals that a Michigan reviewing court *will* consider claims of ineffective assistance of counsel but will be forced to limit itself to examining the trial record for errors, as no other record has been developed.(6) Thus, while *Ginther* and its progeny indicate that it is crucial to develop an adequate record of trial counsel's failures if petitioner's claim is to succeed, we believe that those Michigan courts that have rejected ineffective assistance of counsel claims have done so on the merits of the claim and not due to a procedural default.(7) Because we conclude that there was no firmly established and regularly followed state procedural rule to bar Mitchell's ineffective assistance claim when the Michigan Supreme Court reviewed this case, the district court did not err in considering the claim and we need not engage in a cause-and-prejudice analysis before reaching the substance of Mitchell's claim.

C. Application of AEDPA

The threshold question under AEDPA is whether Mitchell seeks to apply a rule of law that was clearly established at the time his state court conviction became final. *Williams*, 529 U.S. at 390. There is no doubt that the rule of law that Mitchell seeks to apply -- the "per se" ineffective assistance of counsel rule -- was clearly established by the Supreme Court in *United States v. Cronic*, 466 U.S. 648 (1984). In *Cronic*, the Supreme Court held that an appeals court must reverse a criminal defendant's conviction "without any specific showing of prejudice to defendant when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 U.S. at 659 n.25. In other words, when counsel is totally absent during a critical stage of the proceedings, prejudice must be presumed. In *Williams*, the Supreme Court confirmed the vitality of this "per se" approach, noting that while the *Strickland v. Washington*, 488 U.S. 668 (1984), test for ineffective assistance of counsel, requiring proof of deficient performance and prejudice, provides guidance for resolving virtually all ineffective assistance of counsel claims, there are "a few situations in which prejudice may be presumed." *Williams*, 529 U.S. at 391 (citing *Strickland*, 466 U.S. at 692). We have recently applied the presumption-of-prejudice test to a claim of ineffective assistance of counsel. *Olden*, 224 F.3d at 568 (prejudice is presumed when counsel is absent during prosecution's presentation of evidence that implicates defendant because such absence occurred during "critical stage" of trial). Thus, we easily reach the conclusion that it was clearly established by the Supreme Court, as of the time that Mitchell's case was decided in state court, that the "complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice." *Roe v. Flores-Ortega*, 120 S. Ct. 1029, 1038 (2000) (citing *Cronic*, 488 U.S. at 659).

Because there is clearly established law applicable to Mitchell's claim, the next question we must address is whether the Michigan Supreme Court's decision rejecting Mitchell's ineffective assistance claim was "an unreasonable application of" that established law or was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1)-(2). The Warden correctly argues that the district court failed to review the

Michigan Supreme Court findings under the deferential standard of review mandated by AEDPA. The district court's order did not determine whether the Michigan Supreme Court's analysis was objectively unreasonable; instead, it essentially reviewed Mitchell's claims de novo. We must now, therefore, conduct the appropriate review of the Michigan Supreme Court's decision.

D. Mitchell's Ineffective Assistance of Counsel Claim

Although the Michigan Supreme Court properly acknowledged Supreme Court precedent by noting that "[t]he right to counsel extends to representation during any 'critical stage' of the proceedings," it then concluded that the right to counsel "does not require the state to provide the defendant with unlimited access to the attorney during the trial" and that "[a] fortiori, it does not guarantee a defendant 'a private in-depth interview' during pretrial in the place of the defendant's choosing." *Mitchell*, 560 N.W.2d at 605 n.9 (internal citations omitted).

Framing this case as one about "allegations of inadequate preparation," the Michigan Supreme Court declined to apply a per se prejudice analysis to Mitchell's claim after rejecting the suggestion that Mitchell's case presented circumstances that made it unlikely that any lawyer could provide effective representation, that Mitchell was constructively denied counsel, or that he was denied counsel combined with a failure to grant a continuance. *See id.* at 607. The Michigan Supreme Court refuted these theories in inverse order. Relying on *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983), for the proposition that "[n]ot every restriction on counsel's . . . opportunity to investigate . . . or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel," the Michigan Supreme Court determined that it was not error for the state trial court to deny Mitchell's request for a continuance so that he could consult with his lawyer prior to trial. *Mitchell*, 560 N.W.2d at 607 (quoting *Morris*, 461 U.S. at 11-12). Pointing to *United States v. Cronic*, 466 U.S. 648 (1984), the Michigan Supreme Court then held that Evelyn's thirty-day suspension did not constitute a constructive denial of counsel. Moreover, the Michigan Supreme Court declared, a claim of ineffective assistance of counsel "stemming from a thirty-day suspension coupled with six-months time for preparation" does not, pursuant to *Cronic,* create a circumstance making it so unlikely that any lawyer could provide the defendant with constitutionally effective assistance. *See Mitchell*, 560 N.W.2d at 609.

The Michigan Supreme Court then evaluated Evelyn's performance to determine whether it was deficient under the familiar two-part *Strickland* standard and concluded it was not. *Id.* The court first stated that there was no factual basis for concluding that Evelyn's performance was constitutionally inadequate. *See id.* at 609-10. The court then performed the first part of the *Strickland* analysis based on the record before it and determined that Evelyn's performance met constitutional muster. *See id.* at 610-11.

After a thorough review of the record, we are convinced that the undisputed amount of time that Evelyn spent with Mitchell prior to jury selection and the start of trial -- approximately six minutes spanning three separate meetings in the bullpen, when viewed in light of Evelyn's month-long suspension from practice immediately prior to trial -- constituted a complete denial of counsel at a critical stage of the proceedings. We conclude that, in insisting on evaluating Mitchell's claim under the *Strickland* standard for ineffective assistance of counsel, the Michigan Supreme Court erroneously and unreasonably applied clearly established Supreme Court law established in *Cronic*.(8)

E. Constructive Denial of Counsel

The Michigan Supreme Court properly noted the general principles that are applicable to this case, most importantly that the right to the assistance of counsel is the right to effective assistance of counsel. *Cronic*, 466 U.S. at 654. At issue is not the accused's relationship with his lawyer as such, but the integrity of the adversarial process and the right of the accused to "require the prosecution's case to survive the crucible of meaningful adversarial testing." *Id.* at 656, 657 n.21. As the Michigan Supreme Court observed, to prove ineffective assistance of counsel, a defendant must typically demonstrate that specific errors made by trial counsel affected the ability of the defendant to receive a fair trial. The United States Supreme Court has, however, recognized that there are some "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. Such circumstances include the complete denial of counsel, as when counsel is either totally absent or prevented from assisting the accused, at a critical stage of the proceedings. *Id.* at 659. When a complete denial of counsel occurs, the constitutional error is of such a magnitude that a defendant need not "show how specific errors of counsel undermined the reliability of the finding of guilt." *Id.* at 659 n.26.

The Michigan Supreme Court's error was to focus its analysis on Evelyn's thirty-day suspension from the practice of law and frame this case as one about inadequate preparation time. It is true that the Supreme Court has made clear that "external constraints" on trial counsel's performance, such as the trial court's refusal to grant a continuance, will not give rise to a presumption of prejudice. Time constraints do not obviate the need for an individualized inquiry into trial counsel's performance in each case. *See Cronic*, 466 U.S. at 662 n.31. This case is not, however, about external constraints on trial counsel's time to prepare: as the Michigan Supreme Court noted, trial counsel had at least six months to investigate and ready this case for trial. We believe the determinative issue is whether, during the critical seven-month pre-trial period, trial counsel consulted with his client. In *Cronic*, the Supreme Court made clear that there is a per se denial of counsel when counsel is "either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n.25. As we will explain, we believe that the pre-trial period must, according to close analysis of Supreme Court precedent, be considered "critical" for Sixth Amendment purposes. Therefore, Evelyn's failure to consult with Mitchell for more than six minutes, coupled with counsel's month-long suspension from practice, must be considered a per se denial of counsel because counsel was "totally absent . . . during a critical stage of the proceedings."(9) *Id.* The Michigan Supreme Court's decision to the contrary represents an unreasonable application of clearly established Supreme Court precedent.

By erroneously framing its analysis solely around Evelyn's thirty-day suspension, the Michigan Supreme Court failed even to consider whether the pre-trial period constitutes a "critical stage of the proceedings."(10) Indeed, the Michigan Supreme Court concluded that "[d]efendant was not unrepresented during any critical stage of the proceedings," *Mitchell*, 560 N.W.2d at 609 n.15, because he "was represented at the preliminary examination, during trial, and during all critical stages through sentencing." *Id.* Moreover, the Michigan Supreme Court stated that "[e]ven if defendant and his mother were fully creditable and Mr. Evelyn . . . only met with the defendant three times, this is not a 'denial of counsel' during a critical stage. Rather, these are allegations of deficient performance by counsel that must meet the *Strickland* standard." *Id.*

The Supreme Court has decided several cases that make clear that the period between appointment of counsel and the start of trial is indeed a "critical stage" for Sixth

Amendment purposes. In *Powell v. Alabama*, in which a group of African Americans accused of raping two white girls were not appointed counsel until the day of trial, the Supreme Court found that a criminal defendant "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). In support of its finding that defendants in that case were per se denied effective assistance of counsel, the Court noted that:

> [D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

Id. at 57. Indeed, the Court remarked that "[n]o attempt was made to investigate. No opportunity to do so was given . . . . Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities." *Id.* at 58. Later, in *Cronic*, the Supreme Court noted that if no actual "assistance" for the accused's defense is provided, then the Sixth Amendment guarantee has been violated. According to the Court, "[a]ssistance begins with the appointment of counsel, it does not end there." *Cronic*, 466 U.S. at 654 n.11; *cf. Moran v. Burbine*, 475 U.S. 412, 431 (1986) (noting that defendant's Sixth Amendment right to counsel attaches "after the initiation of formal charges").

The pre-trial period constitutes a "critical period" because it encompasses counsel's constitutionally imposed duty to investigate the case. In *Strickland*, the Supreme Court explicitly found that trial counsel has a "duty to investigate" and that to discharge that duty "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. The Supreme Court also recognized that without pre-trial consultation with the defendant, trial counsel cannot fulfill his or her duty to investigate. The Court stated that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* The Court went on to emphasize further the significance of the defendant's input into trial counsel's investigation:

> In particular, what investigation decisions are reasonable depends critically on such information [provided by defendant]. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Id. Because the Supreme Court has repeatedly made clear that there is a duty incumbent on trial counsel to conduct pre-trial investigation, it necessarily follows that trial counsel cannot discharge this duty if he fails to consult with his or her client.(11)

In addition to its failure to recognize the importance of the pre-trial period and the significance of lawyer-client consultation during that period, the Michigan Supreme Court erroneously and unreasonably relied on *Morris v. Slappy*, 461 U.S. 1 (1983), in denying Mitchell's ineffective assistance claims. According to the Michigan Supreme Court, *Slappy* "demonstrates that the suggestion that defendant's right to counsel was violated because the trial court should have granted a continuance is error." *Mitchell*, 560 N.W.2d at 607 (footnote omitted). *Slappy* involved a defendant who claimed that because his public defender fell ill and replacement counsel was substituted twenty-five days before trial, he was effectively unrepresented and deserved a new trial. As the Michigan Supreme Court noted, the *Slappy* Court, in rejecting the defendant's claim, held that "[n]ot every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel . . . . [B]road discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for a delay violates the right to the assistance of counsel." *Slappy*, 461 U.S. at 11-12 (internal citations omitted).

Slappy, however, merely stands for the proposition that not every external limitation on trial counsel's ability to prepare or consult with his client constitutes a per se denial of counsel. The facts in *Slappy* offer lower courts a guide to applying the Court's holding, and the facts render it completely distinguishable from this case. In *Slappy*, the new public defender appointed to defendant's case repeatedly assured the trial court that he was prepared to try the case based on his conferences with the defendant and the study he had made of the investigation. The trial court specifically noted that the first public defender had "well prepared" the case and that the new counsel "had read the transcript of the preliminary hearing, and had 'prepared the case, reviewed all the matters, obtained the pictures, and other items that he intends to produce into evidence.'" *Id.* at 7 (internal quotation omitted). Trial counsel himself stated that "'[m]y feeling is that all investigation that needed to be done and that should be done and quite possibly that could have been done has been done.'" *Id.* (internal quotation omitted).

When the Ninth Circuit reviewed the case, it granted habeas relief after holding that the Sixth Amendment included the right to a "meaningful attorney-client relationship." Reversing, the Supreme Court rejected the "meaningful relationship" requirement because "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney . . . that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel." *Slappy*, 461 U.S. at 13.

Mitchell, however, did not seek new counsel on the ground that he did not have a good "rapport" with Evelyn; he sought to replace Evelyn because his counsel refused to consult with him prior to trial. In *Slappy*, the Court took note of the fact that the defendant's objections appeared to be tactics to delay trial and were not made in good faith. *See id.* at 13. In this case, in contrast, Mitchell sought new counsel for six months prior to his trial. The only reason the question was addressed on the second day of jury selection was because the trial judge failed to rule on any of Mitchell's previous motions for new counsel. Moreover, the *Slappy* Court observed that defendant's new counsel demonstrated "his prompt study of the investigation, his careful review of the materials prepared . . . for trial, his conferences with [defendant], and his representation to the court that 'a further continuance would not benefit me in presenting the case.'" *Id.* at 12.

Slappy does not stand for the proposition that trial counsel need never speak with his client prior to trial; it merely holds that there is no constitutional requirement that defense counsel develop a "rapport" with his client.(12) Instead of falling squarely within *Slappy*'s purview, this case more closely resembles those cases in which there is "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Slappy*, 461 U.S. at 11-12 (internal citations omitted). The Michigan Supreme Court's reliance on *Slappy* is objectively unreasonable in light of the facts in the record.

Our analysis makes clear that, although the Michigan Supreme Court properly identified the appropriate Supreme Court precedent, i.e., that counsel's absence during a critical stage of the proceeding constitutes a per se denial of counsel, it then erroneously and unreasonably applied that precedent by failing to consider whether the pre-trial period was "critical." The Michigan Supreme Court also failed to apply *Geders v. United States*, in which the Supreme Court held that the right to counsel encompasses the right to confer with one's lawyer. *Geders*, 425 U.S. 80, 88-89 (1976). *Geders* held that a court order preventing counsel for the defendant from consulting with his client during an overnight recess in the midst of defendant's testimony constituted a per se denial of counsel during a critical stage of the proceedings in violation of the Sixth Amendment.(13) According to the Supreme Court, "[s]uch recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events." *Id.* at 88. If a defendant must be allowed to consult with his lawyer during an overnight recess, surely the defendant has the right to consult with his lawyer for more than six minutes during the critical pre-trial period.

We do not believe that the rule of law put forth by the Michigan Supreme Court, that the Sixth Amendment "does not guarantee a defendant 'a private in-depth interview' during pretrial in the place of the defendant's choosing," *Mitchell*, 560 N.W.2d at 605 n.9, is an accurate reflection of any known Supreme Court precedent, nor does it in any way decide this case. Mitchell makes no extravagant claim regarding an "in-depth" interview, nor does his complaint hinge on the fact that his meetings with his attorney all took place in the bullpen at the Recorder's Court, where he arguably had no privacy. Mitchell's claim for relief is simply that Mitchell's attorney never consulted with him prior to the start of trial. This claim is adequately borne out by the record.

F. Mitchell's Pre-Trial Contact With His Attorney

The Warden argues that the district court based its decisions on factual findings specifically rejected by the state courts in violation of §§ 2254(e)(1), which requires a habeas court to presume that all factual findings made by a state court are correct absent clear and convincing evidence to the contrary. *See* 28 U.S.C. §§ 2254(e)(1). The presumption of correctness does not, however, extend to the Michigan Supreme Court's legal conclusion that

Mitchell was not without counsel at a critical stage of the proceedings. Thus, the Michigan Supreme Court's pronouncement that "[t]here is no factual basis for a conclusion that counsel's performance was constitutionally deficient," *Mitchell*, 560 N.W.2d at 609, is not due the deference accorded to a pure finding of fact,(14) as this statement encompasses a mixed question of law and fact, which we review de novo. Indeed, our conclusion is dictated by our application of law to facts in the state court record, which is properly governed by §§ 2254(d)(1).

Although the Michigan Supreme Court stated that "[n]o record was made regarding what Mr. Evelyn did or did not do," *Mitchell*, 560 N.W.2d at 609, that court noted that Mitchell "wrote six letters to the trial judge, the chief judge and others requesting removal of counsel," *id.* at 603. These letters, which were part of the record before the Michigan Supreme Court, document Mitchell's unsuccessful efforts to contact his attorney. For example, on February 8, 1989, Mitchell wrote to the court:

> I have been locked up for 5 months and not once have my lawyer took time out to talk to me....3 times after I went to court my lawyer has told me that he would be over to talk to me, but never did.....Every since my second month of being incarcerated I have had my mother go over to his office concerning an evidentiary hearing, she have been at his office many times, she has wrote many letters but he has never replied to her....I know I'm charged for something I haven't done, but I know that if I can't express to Gerald K. Evelyn what happen on the night this incentdent occurd he will not know the best stradagy of what and how to fight this case....For 5 months I have waited patiently, I have tryed every way I can to get him to talk to me, I am tired of being in the dark and knowing he's in

> the dark....So your honor Please take him off my case because he's not representing me at all.

J.A. at 108a - 108b (Handwritten Letter from Mitchell). No one responded to his letters until eleven days before the start of the trial.

On April 27, 1989, the trial judge convened a hearing to discuss Mitchell's motion for appointment of new counsel. At the hearing, Mitchell informed the trial court that he had received a letter stating that Evelyn had been suspended from the practice of law; it does not appear that the trial court was even aware that Evelyn had been suspended. Evelyn did not attend this hearing, presumably because he was suspended from practice at this point. The trial judge postponed a decision on Mitchell's motion until Evelyn was able to be present.

On May 9, 1989, the second day of jury selection, the trial court revisited the issue of Mitchell's request for new counsel. Evelyn was present at this time. At this hearing, Mitchell stated to the court:

> Well, from the very beginning, you know, Mr. Evelyn promised to talk with me. He has failed to talk with me on every occasion that he promised. He has failed to make any motions for me, and he's failed to talk with my mother, which she has written many letters and calls, and went to his office, also, left word with his secretary. And he also showed up an hour late on my final conference and by him letting me know yesterday that he was going to come over and talk with me and by him failing to do that, I just, I just feel it's just incompetent.

J.A. at 174. When the court asked: "[n]ow, in those letters, it was a question of his not keeping appointments, or seeing you as many times as you'd like to be seen in the jail; is that right?" Mitchell then replied: "Yes. *Never seeing me at all.*" J.A. at 174 (emphasis added). He further asserted that "[t]he only time I meet him is in the courtroom, or brief discussion in the bullpen with plenty of other people in the bullpen. I just don't see how courts can say that that's true fairness." J.A. at 187. Mitchell, who is hard of hearing, also claimed that because he was not wearing his hearing aid in the bullpen, he could not hear half of what his lawyer was saying to him. J.A. at 184. At one point, Mitchell asked: "[H]ow can I make it all the way to trial when Mr. Evelyn has never heard my true side of the story." J.A. at 185-86.

Evelyn testified at length during this hearing. While he made the argument that he had delivered discovery materials to Mitchell and was in the process of working out a deal with the prosecutor to suppress certain evidence on the eve of trial, he never disputed the substance of Mitchell's allegations. At one point he did claim: "I talked to him [Mitchell] prior to the [pre-trial] examination, your Honor. He's leaving one visit out at least. We have talked on numerous occasions." J.A. at 186. This non-responsive statement, however, is conclusive only of the fact that he and Mitchell had met in the courtroom bullpen before court appearances, which Mitchell acknowledged. Notably, when presented with the opportunity to clear the record before the trial court judge, Evelyn never disputed the substance of Mitchell's assertions regarding the content of their communications.

At the *Ginther* hearing, Mitchell also testified about the nature of his contact with Evelyn prior to the trial. His testimony at this hearing is consistent with the substance of the letter he wrote to the trial court as well as his testimony before the trial court during jury selection.

> Q:Who was your attorney for this case?
>
> A:Attorney Gerald Evelyn.

Q:Do you recall when you saw this person in relation to the preliminary examination?

A:I recall seeing him sitting in the courtroom, the first time I met him.

Q:At the preliminary examination?

A:Yes.

Q:And, how much contact with him did you have before the preliminary examination?

A:None.

***

Q:When did you next see your attorney?

A:Well, I would see him in the bullpen behind the courtroom, maybe about three times -- three different proceedings.

Q: And, those were later proceedings in Recorder's Court?

A:Yes.

Q:And, roughly, would you say how much contact did you have with him before the court proceedings?

A:*One or two minutes*.

***

Q:Did you see Mr. Evelyn at the Wayne County Jail before your trial in this case?

A:No, I never did.

> Q:When was the first time you saw him in the jail, if at all?
>
> A:The second date -- I mean the first day of picking out the jury.

***

> Q:Before your trial started, in the weeks or months leading up to it, did you contact, or attempt to contact your attorney?
>
> A:Yes, I did. I wrote him letters. They wouldn't accept telephone calls.

J.A. at 151-53 (emphasis added).

The fact that Mitchell's counsel was suspended from the practice of law for the thirty days prior to trial does not decide this case, but it does contribute to the weight of the evidence that demonstrates that there was no consultation between Mitchell and his attorney prior to trial. The Michigan Supreme Court found that Mitchell was never unrepresented during any critical stage of the proceedings. According to that court, because Evelyn's law partner assumed responsibility for Evelyn's cases during his suspension, "there was no period of time when the defendant was not represented." *Mitchell*, 560 N.W.2d at 609 n.15. The Michigan Supreme Court's presumption that Mitchell was continuously represented is directly contradicted by the record. In a letter sent to Mitchell on April 10, 1989 informing him of his suspension, Evelyn advised Mitchell: "You may wish to seek legal advice elsewhere and, in the event you choose to do so, you may either pick-up your file or have your new attorney pick-up your file. You may, should you choose to do so, have your case maintained by our law firm; *in which case, you must expressly indicate same in writing.*" J.A. at 108c (emphasis added). The letter then states: "[S]hould you have any questions or concerns, please do not hesitate to contact Myzell Sowell," Evelyn's law partner. *Id.* The record does not indicate that Mitchell retained Evelyn's law partner, nor does it indicate that he in any way consented to a substitution in counsel. Moreover, we note that no counsel appeared on Mitchell's behalf at the April 11, 1989 hearing before the trial court, which was conducted during Evelyn's suspension, on Mitchell's motion for new counsel. Thus, we conclude that, despite the Michigan Supreme Court's finding, there is clear and convincing evidence that Mitchell was completely unrepresented for the last thirty days prior to his trial.

The Michigan Supreme Court held that, even if it were to find the defendant and his mother credible and assume that Evelyn never contacted witnesses and only met with the defendant three times, it would not find a denial of counsel at a critical stage. *Mitchell*, 560 N.W.2d at 609 n.15. Instead, the Michigan Supreme Court found that the allegations of trial counsel's deficient performance would have to meet the *Strickland* standard of deficient performance and prejudice. *Strickland*, however, applies great deference to decisions by defense attorneys out of concern that a rigid set of guidelines or rules would "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689. The defendant bears the burden of proving counsel's ineffectiveness out of deference for counsel's decisions and trial strategy. *See id.* The illogic of applying *Strickland* to these facts is manifest in that there are no conceivable tactical or strategic reasons for defense counsel to fail to consult with a client prior to trial. Such a meeting is vital if counsel is competently to develop a defense. If counsel does not meet with his client for more than two minutes at a time, the defendant is unable to confide truthfully in his lawyer and counsel will not know, for example, which investigative leads to pursue, whether there are witnesses for the defense, or what kind of alibi the defendant may have.(15)

In *Cronic*, the Supreme Court delineated those few exceptional circumstances that are so likely to prejudice the defendant that a reviewing court need not examine the consequences of the lawyer's conduct: one of these circumstances is the complete denial of counsel to a criminal defendant at a critical stage of the proceedings. *Cronic*, 466 U.S. at 659. In this case, we have demonstrated that, according to Supreme Court precedent, we must consider the pre-trial period "critical" for purposes of the Sixth Amendment. Although Mitchell alleged that his counsel's performance during trial was inadequate, he also alleged that his counsel was utterly absent during the seven-month period prior to trial. Because Mitchell's latter claim alleges his counsel's total absence during a critical period, the Michigan Supreme Court should have applied *Cronic*, rather than *Strickland*, to his claim.(16)

IV. CONCLUSION

In light of the Michigan Supreme Court's assumption that the pre-trial period, during which investigation and consultation with the defendant must occur, was not a "critical stage" of the proceedings, the Michigan Supreme Court unreasonably applied clearly established Supreme Court precedent to the facts of this case. *See* 28 U.S.C. §§ 2254(d)(1). The Supreme Court has long recognized that there is a duty to investigate before trial and that, by failing to consult with the defendant, counsel cannot perform this duty during a critical stage. The undisputed record evidence demonstrates that Mitchell's counsel never consulted with him and that he was completely unrepresented during the entire month prior to his trial. These are clearly circumstances so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Therefore, the Michigan Supreme Court erred by rejecting the per se prejudice analysis and insisting on evaluating Mitchell's claim through the lens of *Strickland*. For the foregoing reasons, we **AFFIRM** the district court's provisional grant of the writ of habeas corpus.

DISSENT

CARR, District Judge, dissenting. I respectfully dissent. I believe that the district court's expressed basis for its decision to grant habeas corpus relief (namely, that the petitioner's right to "private" communication was breached when he met with his lawyer in the jailhouse bullpen) is in error, because there is no such right under the Sixth Amendment or otherwise. In addition, I disagree with the majority's conclusion that this case can be decided on the basis of *United States v. Cronic*, 466 U.S. 648 (1984). The proper standard is, rather, in light of this court's decision in *Dick v. Scroggy*, 882 F.2d 192, 197 (6th Cir. 1989), the cause and prejudice standard of Strickland v. Washington, 466 U.S. 668 (1984). The petitioner not having met his burden under *Strickland* of showing prejudice, the district court's decision should be reversed.

I. There is no Constitutional Right to "Private" Communication

The express basis for the District Judge's decision to grant habeas corpus relief was that there had been no "private" communication between the petitioner and his lawyer prior to trial: "Mr. Mitchell's inability to secure private communication with counsel prior to trial rendered him without representation at his trial in violation of the Sixth

Amendment." (App. 40).

The District Judge appears to have assumed that "private" communication could not occur within the bullpen of the county jail. While such may, in fact, be the case, there is no evidentiary support for this assumption. The District Judge, moreover, failed to point to evidence in the record that the circumstances foreclosed *confidential* communication between the petitioner and his attorney.

The Sixth Amendment assures confidential communication between a defendant and his lawyer. *United States v. Henry*, 447 U.S. 264, 295 (1980) ("the Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney." (Blackmun, J., dissenting); *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973) ("the essence of the Sixth Amendment right is . . . privacy of communication with counsel."); *see also Weatherford v. Bursey*, 429 U.S. 545, 554 n.14 (1977) (noting government's concession that "because the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private").

The constitutional assurance that attorney-client communications shall be "private" in the sense that they are confidential does not mean, however, that they must be "private"in the sense that they are entirely and always outside the physical presence of other persons. This distinction is underscored by this court's rejection of the only case cited by the District Judge - his own earlier decision in *Lakin v. Stine*, 44 F. Supp. 2d 897 (E.D. Mich. 1998) - for the proposition that the Sixth Amendment requires that all communication between counsel and client be "private." In *Lakin v. Stine*, 229 F.3d 1152 (Table, Text in WESTLAW), Unpublished Disposition, 2000 WL 1256900 (6th Cir.(Mich.), Jul 13, 2000), this court held that a habeas petitioner's Sixth Amendment right to counsel had not been abridged when the trial court refused his request to meet with his attorney outside the presence of guards who had been stationed in a jailhouse conference room. *Accord Abrams v. Barnett*, 100 F.3d 485, 489-92 (7th Cir. 1996), *vacated on other grounds*, ___ U.S. ___, 117 S.Ct. 2503 (1997) (rejecting habeas petitioner's claim that denial of his lawyer's request for a private place to meet with the defendant during a noon-hour recess deprived him of his right to counsel.).(1)

Congress has limited the circumstances in which habeas corpus relief can be granted:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §§ 2254(d).

As this court's decision in *Lakin* makes clear, there is no precedent in this Circuit, much less precedent emanating from the United States Supreme Court, that holds that the Sixth Amendment is violated whenever a communication -- no matter how confidential in fact -- between a lawyer and his or her client takes place in the presence of other persons.(2) The district court's decision impermissibly extended constitutional doctrine in violation of 28 U.S.C. §§ 2254(d). Its grant of habeas corpus relief to the petitioner on the basis that the petitioner was unable to confer privately with his attorney, was, accordingly, improper.

II. Defense Counsel's Performance Fell Below Constitutional Norms

Although the district court erred by applying a rule of law that has not been adopted by the Supreme Court, its decision can also be read as being based on the prejudicial effect of Evelyn's failure to have consulted with the petitioner in a meaningful and constitutionally adequate way. To the extent that the district court concluded that Evelyn's conduct in that regard fell below constitutional norms, I agree with the majority. I disagree with the conclusion of the district court and the majority, however, that the petitioner need not show he was prejudiced by his lawyer's failure to have consulted with him adequately prior to trial.

There is no significant dispute between the parties about the number, extent, or substance of the pretrial contacts between the petitioner and his lawyer. Petitioner asserted that Evelyn met with him on only three brief occasions prior to commencement of voir dire; Evelyn stated that the petitioner may have missed one meeting, and that he had "talked" with his client " on numerous occasions."

In addition, the petitioner repeatedly asserted that nothing of substance was discussed during those three or four sessions, and that Evelyn never talked to him about his case before voir dire began. Evelyn's conclusory assertion that he and the petitioner "talked on numerous occasions" is simply not responsive to the petitioner's specific contentions about the lack of substantive conversation about his case.

The Michigan Supreme Court erred, therefore, in its finding that there was "no factual basis for a conclusion that counsel's performance was constitutionally deficient . . . ." 560 N.W.2d 609. Because petitioner's contention about the number and content of his meetings with his lawyer was in the record and uncontroverted, there was a factual basis on which the Michigan courts could have evaluated the adequacy of Evelyn's representation. This aspect of the decision by the Michigan Supreme Court is, accordingly, "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 United States §§ 2254(d)(2).

The Michigan Supreme Court also erred in its determination that Evelyn's performance was not objectively unreasonable. 560 N.W.2d at 610. The principle that failure to consult with a defendant prior to trial constitutes deficient representation is well embedded in Sixth Amendment jurisprudence, and was expressly endorsed by the Supreme Court in *Strickland*. In that case, the Court, in addition to fashioning the standard for evaluating the constitutional sufficiency of an attorney's performance, stated that a defendant's attorney has "the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution."

The Court in *Strickland* further elaborated on the crucial importance of adequate consultation between a defendant and his lawyer:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on

> informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Id. at 691.

Since the *Strickland* decision, lower federal courts have consistently emphasized the relationship between adequate pretrial consultation and the Sixth Amendment right to counsel. *See, e.g., Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998) ("Counsel's admission that he spent at most forty-five minutes with Turner prior to trial demonstrates deficient performance . . . [and is] especially shocking in light of the seriousness of the charges"; the "failure to adequately consult with and prepare his client to testify did not meet the standard of competent representation."); *Noland v. French*, 134 F.3d 208, 218 (4th Cir. 1998) ("Counsel has a duty to keep her client informed of important developments in the trial and 'to consult with the defendant on important decisions.") (*quoting Strickland*); *United States ex rel. Partee v. Lane*, 926 F.2d 694, 701 (7th Cir. 1991) ("Defense counsel must do his utmost to bring his legal acumen to bear on behalf of the defendant; keep the defendant fully informed of developments in the case and consult with the defendant on all major decisions to be made;. . . ."); *Harris By and Through Ramseyer v. Blodgett*, 853 F. Supp. 1239, 1258-59 (W.D. Wash.1994), *aff'd sub nom. Harris By and Through Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995) (record showed that defense counsel met with defendant for less than two hours prior to capital trial; "Counsel's failure to adequately consult with his client fell below the objective standard of reasonableness and amounted to a deficient performance."); *United States ex rel. Cross v. DeRobertis*, 661 F. Supp. 683, 691-92 (N.D. Ill. 1986), *rev'd and remanded on other grounds*, 811 F.2d 1008 (7th Cir. 1987) (citations omitted) (representation inadequate where brief meetings between counsel and clients occurred only in crowded bullpen; "The cornerstones of effective assistance of counsel are the informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of the client's case. Adequate consultation between the attorney and the client is an essential element of competent representation of a criminal defendant.").

Federal courts had reached the same conclusion prior to *Strickland. See, e.g.*, *United States v. Tucker*, 716 F.2d 576, 584 (9th Cir. 1983) (counsel "failed to prepare his client's defense competently under the most tolerant standard of evaluation" where he, inter alia, "failed to obtain legally relevant facts from his client;. . . ."); *United States v. Decoster*, 624 F.2d 196, 209 (D.C. Cir. 1976) ("Realistically, a defense attorney develops his case in large part from information supplied by his client."); *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.1968) ("Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable."); *Maynor v. Green*, 547 F. Supp. 264, 267

(S.D. Ga., 1982) ("the duty to consult is designed to insure that a defendant's counsel fulfills two basic functions: an investigative function and an informative function"; "consultation is a particularly useful method of pretrial investigation. Where there is little or no consultation, and it is apparent that consultation could have led to information that would have affected counsel's decision-making process, effective assistance of counsel is denied."); *Gaines v. Hopper*, 430 F. Supp. 1173, 1178 (M.D. Ga. 1977) ("Effective representation further requires that the lawyer discuss the results of his investigation with his client, explain the legal consequences of it, and consult with the client on possible approaches to the case so that the client has some reasonable understanding of his situation."), *aff'd*, 575 F.2d 1147, 1149-50 (5th Cir. 1978) ("Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel."); *Turner v. State of Maryland*, 206 F. Supp. 111, 114 (D. Md. 1962) *aff'd*, 318 F.2d 852 (4th Cir.1963) ("Counsel should consult with his client a sufficient length of time before the trial to enable counsel to learn the facts, interview any witnesses whose testimony might be helpful, consider the wisest course of action, and explain this to the client. Usually the failure to do so until less than half an hour before the time set for the trial would amount to inadequate representation.").

There can be little doubt, accordingly, that, as a matter of fundamental Sixth Amendment jurisprudence, as consistently declared by the United States Supreme Court and lower federal courts, pretrial consultation between an attorney and his or her client "should be sufficient to determine all legally relevant information known to the defendant." *Tucker*, 716 F.2d at 581. In a word, the principle that failure to consult with one's client prior to trial violates the Sixth Amendment is not "'debatable among reasonable jurists.'" *Nevers v. Killinger*, 169 F.3d 352, 362 (6th Cir. 1999) (quoting *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996)). To the extent, therefore, that the Michigan courts concluded that the petitioner had not shown that his Evelyn's performance fell below constitutional norms, their decisions were "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §§ 2254(d).

III. Petitioner Failed to Show Prejudice

The Michigan Supreme Court concluded that the petitioner was required to show prejudice in order to obtain relief on his claim of ineffective assistance of counsel. 560 N.W.2d at 610. As noted, that court expressly rejected the contention that the per se rule of *Cronic*, on which the majority bases its decision, was applicable. *Id.* at 608.

This court has held that a habeas petitioner must show prejudice where, as in this case, the only meaningful contact between the petitioner and his lawyer occurred on the eve of trial. *Dick v. Scroggy*, 882 F.2d 192, 197 (6th Cir. 1989) (applying *Strickland* to a claim that a lawyer's only pretrial interview occurred on the night before trial, and lasted only thirty to forty-five minutes).

Other circuits likewise apply *Strickland*, rather than *Cronic*, where counsel has failed to fulfill his duty to consult with his client prior to trial. *Harris By and Through Ramseyer v. Wood*, 64 F.3d 1432, 1435 (9th Cir. 1995) (applying *Strickland* where, among other failings, counsel's pretrial meetings with petitioner lasted less than a total of two hours; the state conceded that such constituted deficient assistance of counsel); *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1013 (7th Cir. 1987) (applying *Strickland* to ineffective assistance claim based, inter alia, on failure to meet with the petitioner except on brief occasions in a jail bullpen).(3)

I agree with the Michigan Supreme Court's conclusion that the petitioner failed to meet his burden of showing prejudice. The four witnesses called at that hearing failed to shed any light on the critical questions that arose as a result of Evelyn's failure to consult with the petitioner: namely, what did Evelyn know about the case as the trial began, what more could he have learned through adequate consultation with the petitioner, and what effect would such knowledge have had on the outcome of the trial. Without answers somewhere in the record to those questions, the petitioner cannot prevail.

For reasons that are not explained in and cannot be deduced from the record, neither the petitioner nor Evelyn testified at the *Ginther* hearing.(4) As a result, no evidence was developed at that hearing with regard to the determinative issues in this case. Consequently, the petitioner failed to carry his burden of showing that he was prejudiced as a result of his lawyer's failure to have fulfilled his duty of consulting with him prior to his trial.

Conclusion

The district court erred when it concluded that the petitioner was entitled to relief because his communications with counsel were not private. The Michigan Supreme Court erred when it concluded that the petitioner was not deprived of his right to effective assistance of counsel when his lawyer failed to consult with him in any meaningful way prior to his trial. But that court correctly held that the petitioner was not entitled to relief because he failed to show prejudice from his lawyer's manifest incompetence.

That being said, I acknowledge that this is a close case. While I disagree with the majority's view that its outcome is controlled by *Cronic*, rather than *Strickland*, it is hard to fault the impulse, which, in candor, I share, to find that the facts compel reversal. Evelyn's conduct appears inexcusable, particularly in view of the fact that one of the petitioner's codefendants was acquitted and the other received probation.

Even more inexcusable is the failure of the trial court to have taken the time before commencing a first degree murder trial to inquire effectively into the circumstances, and to have ensured that the petitioner's counsel was reasonably well prepared to defend his client. The trial court's failure, in the face of the petitioner's unanswered claims of lack of contact with his attorney and the lawyer's eve-of-trial suspension from practice, to grant a short continuance is, in a word, incomprehensible. The compulsion to maintain a tidy docket should never, as it so clearly did here, place fundamental rights at risk. Would a week's delay have really mattered?

The message of this case is not that federal courts are quick to intervene into state proceedings; the message is, rather, that the state trial court in this case could and should have done a better job of upholding the Constitution. Had it taken but a few moments to consider the petitioner's complaints meaningfully, or had it postponed the trial for a brief period to make certain that Evelyn was truly ready for trial, this case would not be here. The time the trial court may have saved has led to a great and otherwise unnecessary expenditure of time on the part of the Michigan courts of review, the district court, and this court.

Nonetheless, even though the petitioner was not afforded the kind and quality of representation prior to his trial that he deserved -- and every defendant deserves -- he failed to meet his burden of showing prejudice. His conviction should, accordingly, be affirmed. I, therefore, respectfully dissent.

Footnotes

[*] The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

[1] The facts of the murder are set out in full in the Michigan Supreme Court's opinion, *see People v. Mitchell*, 560 N.W.2d 600 (Mich. 1997), and are summarized in this opinion.

[2] The record does not indicate why Evelyn was suspended.

[3] Moore beat Harlin with his fists, a blackjack, brass knuckles, a baseball bat, and a woodcarving knife. Mitchell also hit Harlin with his fists.

[4] There is no explanation in the Michigan Supreme Court's opinion how Mitchell could have ordered the killing prior to the killer's arrival at Mitchell's apartment. *See Mitchell*, 560 N.W.2d at 616-17 (Mallett, C.J., dissenting).

[5] The dissent noted that while "Evelyn might be a very gifted trial lawyer who knows full well the 'rules of the game,' this cannot excuse the total lack of preparation. Defending a person in a first-degree murder trial is not a game. Effective representation must mean more than showing up and giving a good performance. If truth seeking is to play some role in our criminal justice system, defense attorneys must exert at least some effort to explore the truth so that, if there is exculpatory evidence available in favor of their client, they can present it." *Mitchell*, 560 N.W.2d at 622 n.7.

[6] *See, e.g.*, *People v. Snider*, 608 N.W.2d 502, 517 (Mich. Ct. App. 2000) (where defendant has failed to move for a new trial or an evidentiary hearing, his claim for ineffective assistance of counsel is "largely forfeited" because review is limited to the existing record); *People v. Williams*, 566 N.W.2d 649, 652 (Mich. Ct. App. 1997) ("Because there

was no *Ginther* hearing, our review is limited to mistakes apparent on the record."); *People v. Dixon*, 552 N.W.2d 663, 669 (Mich. Ct. App. 1996) ("Defendant failed to created a testimonial record in the trial court with regard to his claims of ineffective assistance. This failure forecloses appellate review unless the record contains sufficient detail to support defendant's claims.").

[7] In this case, the Michigan Supreme Court determined that, because Evelyn was not called to testify at the *Ginther* hearing, it had "no factual basis for a conclusion that counsel's performance was constitutionally deficient and undermines confidence in the reliability of the verdict." *Mitchell*, 560 N.W.2d at 609. This is a decision on the merits of Mitchell's claims as presented to the court.

[8] In *Dick v. Scroggy*, 882 F.2d 192, 197 (6th Cir. 1989), a panel of this court applied the *Strickland* deficient performance-and-prejudice analysis to a defendant's claim that his defense counsel was constitutionally ineffective because she only interviewed him for 30-45 minutes the night before trial. The court in *Dick* neither addressed whether *Cronic* applied to the facts before it nor specifically rejected it; rather, the court assumed that *Strickland* applied. The absence of reasoning in that case does not persuade us that we must apply *Strickland* to Mitchell's claim. Moreover, the facts of that case are distinguishable: in *Dick*, the defendant was interviewed by his lawyer for 30-45 minutes in one meeting, while in the instant case, Mitchell claims that he met with his lawyer for a total of six minutes spanning three separate meetings. Indeed, the heart of Mitchell's claim is that his lawyer never interviewed him at all. Therefore, based on the law and the facts, we conclude that *Dick* is not controlling authority.

[9] We note that we have held that when an attorney is absent from the courtroom due to a death in the family while the government is presenting evidence of defendant's guilt,

then counsel is absent during a critical stage of the proceeding, and there is a per se denial of counsel if defendant did not knowingly waive his right to counsel. *Olden v. United States*, 224 F.3d 561, 568 (6th Cir. 2000); *see also United States v. Patterson*, 215 F.3d 776, 786 (7th Cir. 2000) (defendant whose lawyer skips multiple days of trial where client has not agreed to substitute representation suffers per se denial of counsel); *Green v. Arn*, 809 F.2d 1257, 1263 (6th Cir. 1987), *aff'd after remand*, 839 F.2d 300 (6th Cir. 1988) (per se denial of counsel when defendant's lawyer was absent during taking of evidence on defendant's guilt).

[10] Even the dissent acknowledges that a defense lawyer's failure to consult with his client prior to trial violates the Sixth Amendment. *See infra* at 37. Indeed, the dissent concludes that the Michigan Supreme Court's holding that Mitchell had not demonstrated constitutionally deficient performance under *Strickland* was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," which is, of course, one basis for granting habeas relief.

[11] This is not, as counsel for the Warden claims, a new rule of law. As our discussion of Supreme Court precedent indicates, the Supreme Court has considered the pre-trial period to be a critical stage of the proceedings since at least 1932, when it handed down *Powell*. A new rule of law "breaks new ground or imposes a new obligation" on the states or the federal government. Alternatively, a court announces a new rule of law "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 300-01 (1989). It cannot seriously be argued that defense counsel's obligation to consult with his client at least once is a new or novel obligation being imposed on the government or that the Supreme Court's cases in *Powell*, *Strickland*, and

Cronic do not compel this result.

[12] Likewise, *Chambers v. Maroney*, 399 U.S. 42, 54 (1970), does not stand for the proposition that defense counsel need not speak with his client prior to trial. The Warden cites *Chambers* for the same proposition as *Slappy*, that "[n]ot every restriction on counsel's time . . . to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to trial." *Slappy*, 461 U.S. at 11. According to the Supreme Court, *Chambers* stands for the proposition that there is no "per se rule requiring reversal of every conviction following tardy appointment of counsel." *Chambers*, 399 U.S. at 54. In *Chambers*, appointed counsel met with the defendant minutes before defendant's re-trial was about to begin. The Supreme Court rejected defendant's challenge to the adequacy of his counsel, concluding that the Court of Appeals, which had investigated counsel's performance, did not err in holding that defendant was not prejudiced by his lawyer's later appointment and that there was no per se rule of prejudice which applied to defendant's case. *Chambers* is not controlling because it involved a defendant's re-trial, not his first trial, and the issue directly before the Court was a last-minute appointment and the ability of counsel to prepare for trial. Moreover, Chambers's second lawyer was presumably privy to the investigation and research prepared by Chambers's first lawyer, whose performance went unchallenged.

[13] The Michigan Supreme Court cited to *Perry v. Leeke*, 488 U.S. 272 (1989), to support the proposition that the right to counsel "does not require the state to provide the defendant with unlimited access to the attorney during the trial." *Mitchell*, 560 N.W.2d at 605 n.9. *Perry* dealt with a defendant's assertion that his right to counsel was presumptively denied when the state court refused to allow him to consult with his lawyer during a fifteen-minute

recess between his direct and cross-examination. Distinguishing between the fifteen-minute recess at issue in the case before it and the overnight recess at issue in *Geders*, the Supreme Court observed that "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. *He has an absolute right to such consultation before he begins to testify*, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice." *Perry*, 488 U.S. at 281 (emphasis added). The Court's holding in *Perry* is a narrow one which is confined to the period in which a defendant is testifying. The case does not support the much broader proposition that the defendant may not have unlimited access to his attorney during the trial. Indeed, by noting that the defendant "has an absolute right" to consult with his attorney before he begins to testify, the Supreme Court appears to have held the opposite of the Michigan Supreme Court's interpretation.

[14] The dissent also rejects the Michigan Supreme Court's determination that the record did not support the conclusion that counsel's performance was constitutionally deficient. *See infra* at 38. Indeed, the dissent concludes that this aspect of the Michigan Supreme Court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," another basis for granting habeas relief. *Infra* at 38 (quoting 28 U.S.C. §§ 2254(d)(2)).

[15] Defense counsel's failure to speak with his client also violates several standards articulated in the ABA Standards for Criminal Justice. For example, the Duty to Keep Client Informed Standard states: "(a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information" and "(b)

Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." ABA Standards for Criminal Justice 4-3.8 (3d ed. 1993).

[16] Finally, although the district court did not comment upon Mitchell's claim that his appellate counsel was constitutionally ineffective, we note that, were we to accept the Warden's argument that a defendant forfeits his ineffective assistance of counsel claim if he fails to call his trial attorney as a witness at the *Ginther* hearing, we do not believe that the appellate counsel's failure to call the trial attorney could be considered reasonable strategy on the facts of this case. It is not strategy for an appellate attorney to ask for a *Ginther* hearing and then to conduct it in such a way as to legally preclude relief for the defendant.

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[1] I note that the American Bar Association Standards for Criminal Justice state that "to ensure the privacy essential for confidential communication between lawyer and client, adequate facilities should be available for private counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel." ABA Standards for Criminal Justice, The Defense Function, Standard 4- 3.1(c). While the opportunity to confer outside the presence - and not just outside of the hearing - of other persons is clearly conducive to a meaningful attorney-client relationship and effective communication, the ABA Standard states a desired goal, not a constitutional norm.

[2] If the Sixth Amendment were violated by the mere physical presence of other persons while a lawyer and client were conversing confidentially, every discussion between counsel and client during trial could occur only if the courtroom were cleared, or a recess were taken.

[3] Even if we properly could disregard *Dick*, I would nonetheless conclude that *Strickland*, rather than *Cronic*, is

the proper standard. Although the failure to meet with one's client appears inexplicable and unjustifiable, it does not, as required by *Cronic*, present "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U.S. at 658. Claims of ineffectiveness based on the failure of counsel to perform his or her duties adequately prior to trial are routinely litigated in state and federal courts. Nor can I conclude, as required under *Cronic*, that Evelyn "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," or was "prevented from assisting the accused during a critical stage of the proceeding." *Id.* Nor does the failure to meet with one's client prior to trial automatically make "the likelihood that counsel [can perform] as an effective adversary . . . so remote as to [make] the trial inherently unfair." *Id.* at 661.

Here, though Evelyn failed to assist the petitioner during a critical stage of the proceeding, he was not prevented from doing so by the trial court or any other external agency. Though his challenge to the state's case may have been more effective had he taken the time to learn what he could from the petitioner, he nonetheless subjected the state's case to meaningful challenge, as shown by the reduction, on his motion, of the charge from first to second degree murder.

[4] Contrary to the Warden's argument, I do not find that petitioner's failure to call Evelyn at the *Ginther* hearing waived his claim of ineffective assistance of counsel. I do not, moreover, read the opinion of the Michigan Supreme Court as holding that claims of ineffective assistance will be deemed defaulted whenever a petitioner, though able to do so, fails to call his former attorney at a *Ginther* hearing. That opinion, and my dissent, underscore, however, the risks that a petitioner runs when he foregoes calling his former counsel, especially where the determinative issue is what the lawyer knew and did with that knowledge before

the trial began.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Charlie Lee Mitchell,
Plaintiff,

No. 98-71338
Hon. Arthur J. Tarnow

v.

Gerald Mason,
Defendant.
______________________/

JUDGMENT

At a session of said Court, held in the
Theodore Levin United States Courthouse
on July 8, 1999

Present: Honorable Arthur J. Tarnow
United States District Judge

The Clerk shall enter judgment providing. "The petition for writ of habeas corpus is conditionally granted. Unless the state takes action to afford Petitioner a new trial within ninety (90) days of the date of the order, he may apply for a writ ordering respondent to vacate the sentences for these convictions." Order and Opinion granting habeas corpus relief and rejecting 85a the Magistrate Judge's Report and Recommendation will be issued at a later date.

Arthur J. Tarnow
United States District Judge

Date: July 8, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLIE LEE MITCHELL.

Petitioner, Case No. 98-71338
Honorable Arthur J. Tarnow
United State District Judge

v.

GERALD MASON,

Respondent.
_____________________________/

ORDER AND OPINION GRANTING HABEAS CORPUS RELIEF AND REJECTING THE MAGISTRATE'S REPORT AND RECOMMENDATION (DOCKET #29)

I. Introduction[1]

Petitioner, Charlie Lee Mitchell filed an application for writ of habeas corpus pursuant to 25 U.S.C. § 2254 on the basis that the trial judge denied him the constitutional guarantee to be represented by counsel as provided for by the Sixth Amendment. Mr. Mitchell informed the court several times prior to the start of his trial that he had never met privately with his attorney.[2] Having taken Mr. Mitchell's request under advisement to await the reinstatement of the attorney, the trial judge revisited the request with the attorney present in the courtroom. The trial judge informed Mr. Mitchell that subjective dissatisfaction with counsel does not require the court to assign a new attorney and, therefore, denied Mr. Mitchell's request. The trial court was correct, a subjective test of a defendant's satisfaction with counsel does not dictate an order for new counsel. However, the attorney's neglect of his client met the objective test of a denial of counsel. The Court grants Mr. Mitchell's petition of habeas corpus, because the state trial court committed constitutional error denying his request for new counsel.

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[1] Law Clerk Emily Klarman provided quality research assistance.

[2] The State Bar of Michigan had suspended his attorney from practice for thirty (30) days one month prior to the commencement of Mr. Mitchell's trial. This is not the basis of this court's ruling.

II. Background

Charged with first-degree murder, Mr. Mitchell faced a jury trial without ever having spoken with his attorney in private. The only conversations that took place between the two of them occurred in the bullpen of Recorder's Court, Detroit, Michigan, certainly not a private setting. Defense lawyers can meet with their clients in the bullpen, but the presence of other chills any meaningful or confidential exchange. In addition to the exposed atmosphere, Mr. Mitchell, without his needed hearing aid, could only understand about half of the things Mr. Evelyn said to him in the bullpen. Even these harried conversations were early in the process. From the delivery of discovery materials to Mr. Mitchell until the time of trial, a period of approximately six months, the attorney never communicated with his client.

Mr. Mitchell informed the system by writing six letters explaining the difficulties he endured as he tried to garner meaningful and private communication with his attorney of record, two letters to Judge Farmer, two to Judge Roberson, one to the clerk and one to the Attorney Grievance Commission. A week or so before the commencement of the trial and during the attorney's suspension period, Mr. Mitchell appeared before the trial judge *in pro per* to ask the court for withdrawal of counsel. After Mr. Mitchell told of the absence of communication with his attorney, the judge took the motion under advisement until he had a chance to reexamine the issue with both the attorney and client present.

When trial began, Mr. Mitchell renewed his motion for withdrawal of counsel; counsel had not visited him the prior evening, a meeting ordered by the judge. The court recommended an adjournment of the trial at one o'clock that day to give Mr. Mitchell the opportunity to discuss matters with counsel. Mr. Mitchell, not satisfied with the proposed solution, posited the simple, yet poignant question of, "How can I make it all the way to trial when Mr. Evelyn has never heard my true side of the story?"

Counsel suggested that should Mr. Mitchell have discontent with counsel in the future, the court could afford him an opportunity to reassess the motion. The judge responded, " I will listen to him at any time, but I don't want to mislead you with the impression that just because you're still dissatisfied with your attorney that the Court is going to discontinue the trial and appoint new counsel".

The trial judge denied Mr. Mitchell's motion for new counsel without prejudice and Mr. Mitchell did not raise the issue again. Counsel proceeded to represent Mr. Mitchell at the trial, cross-examining witnesses and addressing the jury. At the conclusion of the trial, the jury returned with a guilty verdict for second-degree murder. The judge sentenced Mr. Mitchell to 10-15 years of imprisonment.

Mr. Mitchell appealed as of right to the Michigan Court of Appeals and in an unpublished *per curiam* opinion, dated January 5, 1994, the court affirmed the conviction. The Michigan Supreme Court leave to appeal the decision. The majority held in part that no deprivation of effective assistance of counsel occurred, because the Court did not consider trial preparation a critical state of the proceedings. *People v Mitchell*, 454 Mich. 145, 166 (1997). The majority focused on counsel's performance at trial, not the relationship between Mr. Mitchell and his attorney. *Id.* "If counsel is a reasonably effective advocate he meets constitutional standards irrespective of his clients' evaluation of his performance." *Id.* at 167 (quoting *United States v Cronic*, 466 U.S. 468, 657 n. 21 (1984).

The dissent, however, would have ruled that counsel's failure to ever interview his client translated into a *per se* violation of Mr. Mitchell's Sixth Amendment rights. The case should not have been analyzed under an ineffective assistance of counsel doctrine. The "facts of this case justify a presumption of ineffectiveness without inquiry into actual performance or prejudice." *Id.* at 178. The dissent, in criticism of the majority's narrow view of the facts, expanded the analysis from a focus on the attorney's one month suspension to the absence of communication between attorney and client during the entire pretrial preparation period of approximately six months. The dissent analyzed the facts under a totality of the circumstances' test, including the thirty-day suspension, the gravity of the charge, all of Mr. Mitchell's unheeded attempts to arrange a private meeting with Mr. Evelyn and the court's refusal of Mr. Mitchell's timely request for substitution of counsel. The dissent concluded that Mr. Mitchell had been denied his Sixth Amendment right *per se*. *Mitchell* at 193.

III. Standard of Review

The Petitioner's application is governed by the provisions of the Antiterrorism and Effective Death Penalty

Act of 1996 (AEDPA) because his application was filed after April 26, 1996.

28 U.S.C. §2254(d) provides:

> (e) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on a unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *Harpster v State of Ohio*, 128 F. 3d 322, 326 (6th Cir. 1997); *cert den* 118 S. Ct. 1044; 140 L Ed. 2d 1019 (1998). Habeas relief cannot be granted unless the state court's legal decision was contrary to, or was an unreasonable application of, "clearly established" United States Supreme Court law or the state court's application of the law to the facts was an "unreasonable determination of the facts in light of the evidence...". *Id* at (d)(1)-(2).

The factual determination of a state court are presumed correct unless rebutted by convincing evidence. 28 U.S.C. § 2254(e)(1). a federal court must apply the presumption of correctness to state court findings of fact for habeas corpus purposes unless convincing evidence is offered to rebut this presumption. *Warren v Smith*, 161 F. 3d 358, 360-361 (6th Cir. 1998); 28 U.S.C. § 2254(e)(1).

The Sixth Circuit has recently adopted a standard of review in *Nevers v Killinger*, 169 F.3d, 1999 WL 97993 (6th Cir. 1999) *cert. denied*,__S.Ct__, 1999 WL 231585 (June 14, 1999). The Sixth Circuit held that the deference to the state courts' judgments required under the AEDPA would be achieved by adopting the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be debatable among reasonable jurists if it is so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes. *See also Tucker v Prelesnik*, __F.3d_1999 WL 374105, *6 (6th Cir. (Mich.) June 10, 1999) (discussing the *Nevers* decision); *Larkin v Stine*, 44 F. Supp. 2d 897 (E.D. Mich 1999); *French v Jones*, 41 F. Supp. 2d 726 (E.D. Mich 1999).

IV. Analysis

The trial court denied Mr. Mitchell's right to counsel as guaranteed by the Sixth Amendment to the U.S. Constitution, "In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. The actual or constructive denial of counsel can never be considered harmless error, because the right to counsel is core to our system. *Holloway v Arkansas*, 435 U.S. 475, 489, 98, S. Ct. 1173, 55 L.Ed 426 (1978) (quoting from *Chapman v State of California*, 386 U.S. 18, 23, 87 S. Ct. 824, 826 (1967).

As the trial judge correctly stated, no weight is attached to a defendant's expression of satisfaction or dissatisfaction with counsel. *United States v Cronic*, 466 U.S. 648,657, n.21 (1984), *Ward v United States*, 995 F.2d 1317, 1321 (1993). Instead, an objective reasonableness test is applied to counsel's effective advocacy. *Id.*

Giving form to the relationship between attorney and client, the Supreme Court held that critical to the attorney's representation, communication between the two must exist. *Geders v United States*, 425 U.S. 80, 91, 90 S. Ct. 1330, 47 L Ed 2d 592 (1976). The denial of the opportunity to confer with any attorney results in reversible constitutional error. *Id.*

The great lengths to which the system extends to protect attorney-client communication demonstrate the importance of conversation between attorney and client in the legal world. *Swidler & Berlin, et al. United States*, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed.2d 379 (1998) (Attorney-client privilege survives the death of the client). Habeas relief has been granted in similar circumstances where a petitioner had been denied the ability to speak in private with his attorney and then forced to endure trial. *See Lakin v Stine*, 44 F. Supp. 2d 897 (1999). Meaningful, confidential and private conversation creates the attorney-client relationship, without communication the attorney can only posture as one, the communication derives an attorney, a necessary element composing a lawyer. *Id.*

Mr. Mitchell's inability to secure private communication with counsel prior to trial rendered him without representation at his trial in violation of the Six Amendment. Pretrial preparation is a critical stage of t proceeding. *Geders* and *Lakin, supra*. The trial judge throughout the renewed motion to dismiss counsel kept voicing his concern that the trial had begun and he did not want to postpone trial. The repetition of the statements implied that the delay in Mr. Mitchell's request for new counsel was Mr. Mitchell's fault. Such a conclusion, however, could not be further from the truth, because Mr. Mitchell made substantial efforts prior to the commencement of trial to secure responsive counsel for himself.

He called his attorney collect in order to converse with him, but the attorney would not accept the charges. Mr. Mitchell had his mother phone and stop by the attorney's office in hopes of capturing some response from the attorney, but to no avail. Mr. Mitchell wrote six letters to the courts in an attempt to inform the system of the fact that counsel never met with him once to discuss the case. Mr. Evelyn broke promises to meet with Mr. Mitchell on many occasions, including failing to meet with him the night before the beginning of trial. A meeting that had been ordered by the trial judge. Mr. Mitchell brought a motion for appointment of new counsel a week and half before the trial was scheduled to begin. This was held in abeyance by the trial judge to the day of trial, not Mr. Mitchell. Thus, the trial judge was aware of all of Mr. Mitchell's efforts. He should not have blamed Mr. Mitchell for his delay in raising the issue.

Respondent conceded the factual underpinnings that no private communication took place between Mr. Mitchell and Mr. Evelyn, but argued that the Sixth Amendment does not guarantee such communication. Further, that pretrial preparation should not be considered a critical part of the proceeding. Respondent concluded that the contours of the Sixth Amendment have not been held to embody the chance to confer one-on-one with an attorney, and presents a case of first impression for the court. As such habeas relief cannot be granted for non-established law, only for the denial of a known federal or constitutional right.

The court holds that the Sixth Amendment does secure communication between attorney and client. It is not a new rule of law. See, *Geders, supra*. As the Supreme Court held in *Geders*, for an attorney-client relationship to exist, the two must communicate. Without the crucial condition of conversation between them a constitutional violation occurs. Given Supreme Court precedent that confidential and meaningful communication is critical to an attorney relationship, the fact that Mr. Evelyn never once spoke in private with Mr. Mitchell prior to a murder trial translates into a denial of Mr. Mitchell's right to counsel.

The reduction in the charge from first-degree murder to second degree is irrelevant to the instant analysis, because as the dissenting opinion of the Michigan Supreme Court in Mr. Mitchell's appeal indicated, the fact that an attorney can put on a good show in court does not mean that a defendant had been provided counsel. Furthermore, one cannot speculate as to what takes place behind the closed jury door. It may be that an attorney who had put forth a modicum of pretrial preparation would have been able to obtain an acquittal for the client. The jury's lowering of the charge does not provide a useful barometer as to Mr. Evelyn's representation of Mr. Mitchell, because no one knows why or how the jury decided to find Mr. Mitchell guilty of second-degree murder, but not first degree. Consider also the fact that Mr. Mitchell's co-defendant, Mr. Lamont Mason, tried concurrently, but with a separate jury was acquitted of all charges by his jury. It is anybody's guess as to what the result would have been for Mr. Mitchell had he been given adequate representation at his trial.

In summary, prior to trial, Mr. Mitchell attempted many times to speak with his attorney in private, but could not. Once informed of this reality, the trial court should have taken proper steps to rectify the problem. For example, the judge cou94ald have removed Mr. Evelyn, found him in contempt, fined him and appointed new counsel, as Judge Vonda R. Evans for the Wayne Circuit Court did on the day of trial to a defense attorney, who failed to speak with his client for a period of 10 weeks. *See* David Shepardson, *Court Delays Trial in Cop's Killing*, The Detroit News, June 8, 1999. The trial judge's failure to correct the problem resulted in a denial of Mr. Mitchell's right to counsel. Therefore, the court grants habeas relief.

V. Conclusion

IT IS HEREBY ORDERED that Magistrate's Report and Recommendation is rejected and the Petitioner's application for writ of habeas corpus is conditionally granted. Unless the state takes action to afford Petitioner a new trial within ninety (90) days of the date of the July 8, 1999 judgement, he may apply for a writ ordering respondent to vacate the sentence for the conviction.

Arthur J. Tarnow
United States District Judge

Dated: July 19, 1999

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 98-CV-71338-DT

CHARLIE LEE MITCHELL.

Petitioner, Civil Action No. 98-CV-71338-DT
District Judge Arthur J. Tarnow
v. Magistrate Judge Thomas A. Carlson

GERALD MASON,

Respondent.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

RECOMMENDATION: The instant Petition for Writ of Habeas Corpus should be dismissed as Petitioner has shown no violations of his federal constitutional rights.

* * *

Petitioner, Charlie Lee Mitchell, a Michigan prisoner[1] convicted of second degree murder, filed a Petition for writ of Habeas Corpus under 28 U.S.C. § 2254, by and through the State Appellate Defender Office, on March 25, 1998, challenging the validity of his underlying

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[1] Petitioner is currently incarcerated at Camp Brighton in Pinckney, Michigan

state conviction. Petitioner was convicted after a jury trial on May 17, 1989, in the Recorder's Court of the City of Detroit of second degree murder and was subsequently sentenced to between 10 and 15 years' imprisonment.

Petitioner filed an appeal as of right in the Michigan Court of Appeals and , in an unpublished per curiam opinion dated January 5, 1994, the Court affirmed the conviction. (Docket #118832).[2] The Michigan Supreme Court granted leave to appeal and, in a published opinion dated March 27, 1997, the majority held that the Petition had not overcome the presumption that trial counsel's performance had been reasonable, and the alleged deficiencies by counsel were not shown to have prejudiced the outcome. People v. Mitchell, 454 Mich 145 (1997).[3]

Petitioner then filed the instant Petition of Writ of Habeas Corpus in this Court asserting the following three grounds for relief:

1. The trial court violated Petitioner's right to counsel by failing to appoint new counsel, or grant a continuance, when the judge was

---

[2] Following Petitioner's conviction, the Court of Appeals initially remanded the case for a Ginther hearing on the issue of ineffective assistance of counsel. Trial counsel was not called as a witness and the trial court held that Petitioner had not shown objective unreasonableness or prejudice. Thereafter, the Court of Appeals affirmed Petitioner's conviction, but on the cross appeal by the state, found error in the scoring of certain offense variables under Michigan's Sentencing Guidelines. The Court of Appeals ordered the case remanded to the trial court for resentencing consistent with the appellate panel's rescoring.

[3] The Michigan Supreme Court also found that the Court of Appeals had erred in ordering resentencing on the basis of a scoring error under the Michigan Sentencing Guidelines.

> informed 11 days prior to trial that counsel had not interviewed him and was suspended from the practice of law up to the start of his trial.
>
> 2. Trial counsel's failure to interview or call three res gesta witnesses who would have given favorable testimony constituted ineffective assistance of counsel.
>
> 3. Petitioner was denied the effective assistance of appellate counsel and a full and fair hearing on the issues presented.

Respondent filed a Answer to the Petition on June 3, 1998, contending that none of the issues raised by Petitioner had any merit. No reply to Respondent's Answer has been filed to date. The case was referred to the undersigned on March 3, 1999.

THE FACTS

The facts upon which the challenged conviction is based can be excerpted from the published opinion of the Michigan Supreme Court on March 25, 1997 (Docket #26):

> On October 3, 1988, decedent Raymond Harlin was the victim of an altercation that took place in defendant Charlie Mitchell's apartment. Mr. Harlin was beaten with fists, a blackjack, brass knuckles, a baseball bat, and a woodcarving knife before he was shot. He jumped out the window of the third floor apartment and took a cab to Henry Ford Hospital where he died. The cause of death was gunshot wounds to the neck and

back.

Defendant was charged with first-degree murder. Gerald Evelyn was appointed counsel for Mr. Mitchell on October 6, 1988, and represented him at the preliminary examination on October 14, 1988. At the preliminary examination, the prosecution called Tyrone Thompson and Mr. Evelyn actively interposed objections during his testimony and argued against the bindover. Mr. Evelyn represented defendant at the final conference on February 3, 1989. On April 5, six months after appointment, Mr. Evelyn received a disciplinary suspension which expired May 5, 1989.

Trial began on May 8, 1989. Tyrone Thompson testified as he had at the preliminary examination hearing that defendant was the leader of a drug ring and gave the order to shoot Mr. Harlin, which was carried out by codefendant Lamont Mason. Defendant Mitchell did not take the stand, and counsel contended in closing argument that Mr. Thompson's testimony that defendant ordered the killing was equivocal and that the prosecution had failed to carry the burden of proof beyond a reasonable doubt.

Before trial, defendant wrote six letters to the trial judge, the chief judge, and others, requesting removal of counsel. Defendant complained that Mr. Evelyn had not visited him at the Wayne County jail, instead only meeting with him in the "bullpen" at the

Recorder's Court. Defendant also100a believed that there were certain motions that Mr. Evelyn needed to make be100afore the time to do so expired. On April 27, 1989, eleven days before jury selection was to begin, defendant appeared before the court in propria persona for a hearing on defendant's "motion for withdrawal of counsel." Defendant informed the judge on the record that he did not believe counsel was responsive to his concerns, and the counsel had been suspended from practice for thirty days from April5, 1989, to May 5, 1989. Counsel was officially reinstated on May 8, 1989, the day jury selection in defendant's trial began. That day, Mr. Evelyn advised the court that defendant wanted him removed and had filed a grievance against him. Counsel did not indicate that he was unprepared.

The judge had taken the April 27 motion under advisement pending receipt of a response from Mr. Evelyn. The issue was revisited on Tuesday, May 9, the second day of jury selection. Mr. Evelyn advised the court that "as of yesterday evening," at the conclusion of proceedings, defendant was satisfied with his representation; but, because he had been unable to visit him in the jail that evening, defendant would like him removed as counsel. Mr. Evelyn stated that he had talked with defendant on numerous occasions. The court found nothing that would warrant a change of counsel, nor would the court "abort" the proceedings.

The defendant confirmed that he had received copies of the prosecutor's file in the instant case and another pending case and this transcripts in March. but stated that counsel's failure to discuss matters with him had lead to specific deficiencies. which he detailed. The court directed counsel to confer with defendant and to evaluate and report back regarding any motions defendant might wish to be heard, and Mr. Evelyn's professional opinion regarding whether they were appropriate. The motion was denied without prejudice.

Thereafter, the defendant's concerns over evidence seized at the apartment building from apartment 302 and the validity of the search warrant with regard to apartment 302 were resolved to defendant's satisfaction with a stipulation in which the parties agreed that none of the evidence from apartment 302 except the weapons involved would be admitted. Defendant also expressly waived his right to a Walker hearing for the purpose of suppressing his statement. On Monday, May 15, 1989, Mr. Evelyn informed the court that he had received a grievance filed by the defendant on May 1. Defendant stated he was satisfied with counsel's resolution of his concerns and wanted to withdraw the grievance.

People v Mitchell, 454 Mich at 148-151.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pub.L. No. 104-132. 110 Stat. 1214 (1996), effective April 24, 1996, significantly changed the manner in which federal courts review habeas petitions. See 28 U.S.C. § 2254(d), (e)(1) (Supp. 1997).[4] Pursuant to the amended provisions of § 2254 (d), a writ of habeas corpus may not be granted unless the state court proceedings:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C.§ 2254 (d)(1)-(2) (Supp. 1997).

In reviewing the petition to determine, pursuant to subsection (2), whether the decision was based on an unreasonable determination of facts, we presume correct the factual finding made by the state court, § 2254 (e)(1), and the petitioner may rebut the presumption of corrections only with clear and convincing evidence.

THE ISSUES

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[4] The Supreme Court in Lynch v Murphy, 521 U.S. 320 (1997), clarified that those changes apply to cases filed after April 24, 1996. See also Groseclose v Bell, 130 F.3d 1161, 1164 (6th Cir. 1997), cert. denied, __ U.S. __, 118 S. Ct. 1826 (1998). Petitioner filed the petition at issue here on March 25, 1998, well after the effective date of the AEDPA. Therefore, the provisions of the AEDPA, including the amended standard of review, apply to this case.

A. RULING ON MOTION FOR SUBSTITUTE COUNSEL

Petitioner initially argues that the trial court abused its discretion in not granting his request for a continuance and for substitute trial counsel where his original appointed counsel was suspended from the practice of law for a thirty day period immediately prior to trial. Petitioner stated that he did not meet a single time privately with his attorney during that 30 day suspension. The trial court declined to a continuance or appoint substitute counsel. Petitioner now claims that the denial of his motion deprived him of his right to the effective assistance of counsel.

The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court. Bennett v Scroggy, 793 F.2d 772 (6th Cir. 1986). The judge's decision to deny such a motion will not be disturbed unless the abuse of discretion has "been so arbitrary and fundamentally unfair that it violates constitutional principles of due process." Id. at 774-75. There must also be a showing that a continuance would have "furthered the court's attempt to secure a just determination of the cause." Id. at 775. In order to determine whether the denial of the petitioner's motion for a continuance violated his due process right, we must look to the following factors:

> The diligence of the defense in interviewing witnesses and procuring their presence, the probability of procuring their testimony within a reasonable time, the specificity with which the defense is able to describe their expected knowledge or testimony, the degree to which such testimony is expected to be favorable to the accused, and the unique or cumulative nature of the

testimony.

> Id. at 774. (quoting Hicks v Wainwright, 633 F.2d 1146, 1149 (5th Cir. 1981)).

In the instant case, Gerald Evelyn was appointed counsel for Petitioner on October 6, 1988, and represented him at the preliminary examination a week later. At the preliminary examination, defense counsel cross-examined prosecution witnesses and argued against the bindover. Mr. Evelyn later represented Petitioner at the final conference on February 3, 1989. As pointed out by the Michigan Supreme Court, Mr. Evelyn did not receive his disciplinary suspension until April 5, 1989, six months after appointment, and was reinstated on May 5, 1989, three days before the trial began. People v Mitchell, 454 Mich at 148.

Thus, Petitioner's attorney had ample opportunity to interview Petitioner and become familiar with the factual nature of the case prior to his short suspension. While Petitioner may not have been satisfied with the number of times he was able to meet with his attorney privately prior to trial, the right to counsel does not guarantee a defendant a private in-depth interview during pretrial in the place of the defendant's choosing. See, e.g., Perry v Leeke, 488 U.S. 272 (1989). Moreover, Petitioner told the court during the trial that he was satisfied with counsel's resolution of his concerns and no longer wished to proceed with a grievance that he had previously filed against the attorney. Since the Petitioner has failed to show that the trial judge's refusal to grant a continuance and appoint substitute counsel was so arbitrary and fundamentally unfair that it violated constitutional principles of due process, this claim should be rejected as being without merit.

2. EFFECTIVE ASSISTANCE OF COUNSEL

Petitioner next challenges the competency of his trial attorney. Petitioner claims he received ineffective assistance of counsel when his attorney failed to call certain witnesses at trial. Respondent countered that the overall performance of counsel was with in the range of that demanded of lawyers practicing criminal law.

In order to establish an ineffective assistance of counsel claim, a habeas petitioner has the burden of demonstrating that his attorney's performance was deficient by making errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. In addition, the defendant must show that the deficient performance prejudiced the defendant to the point of depriving him of a fair trial whose result is reliable. Strickland v Washington, 466 U.S. 668, 687, (1984).

Therefore, in order to establish an ineffective assistance of counsel claim, a habeas petitioner has the burden of demonstrating that (1) his attorney made serious errors which undermined the proper functioning of the adversarial process, and that (2) but for those errors, "the result of the proceeding would have been different." Strickland v Washington, 466 U.S. at 694. A defendant asserting a claim of inadequate counsel must satisfy both elements of the test; the defendant must demonstrate constitutionally inadequate assistance of counsel and prejudice resulting therefrom. Id. at 697. Judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Because of the difficulties in assessing counsel's performance, a reviewing court must "indulge a strong presumption that counsel's conduct falls with the wide range of reasonable professional assistance; that is the (petitioner) must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. (citing Michel v New York, 350 U.S. 91, 101 (1955)).

The Petitioner cannot meet this burden here as he has failed to demonstrate that his attorney made any serious errors which undermined the proper functioning of the adversarial process. Following an evidentiary hearing before the trial court on the issue of whether defense counsel had been ineffective, the court concluded that the testimony of the three witnesses who Petitioner argues should have been called at trial would have been inconsistent and contradictory. Furthermore, the trial court concluded that even viewing the testimony in the light most favorable to the Petitioner, the court was not persuaded that he was prejudiced or that a different result would have occurred at trial had those witnesses been called.

The undersigned persuaded that the decision not to call the three witnesses at trial was a matter of trial strategy, which should not be second guessed simply because it was unsuccessful. As pointed out by the Michigan Supreme Court, "counsel may have failed to call the witnesses because of a familiar strategy consideration, namely, that calling witnesses whose testimony is not believable (even with regard to peripheral matters), may jeopardize an otherwise viable defense". People v Mitchell, 454 Mich at 166. Moreover, if Petitioner "disagreed with the trial strategy of his chosen counsel, his remedy was to find a different lawyer before trial had begun, not to complain of his lack of success once trial was over." United States v Pasarell, 727 F.2d 13 (1st Cir.), cert. denied, 469 U.S. 826 (1984).

There is no basis to conclude that the failure to present these witnesses was error or that k had the witnesses been presented, "the factfinder would have had a reasonable doubt respecting guilt." Strickland, supra at

695, Having failed to establish that his counsel's performance was so beneath the range of that demanded of criminal lawyers that he was prejudiced to the point of being wrongly convicted, this habeas claim should be dismissed as being without merit.

3. EFFECTIVENESS OF APPELLATE COUNSEL

Petitioner also challenges the competency of his appellate attorney. Petitioner claims he received ineffective assistance of appellate counsel when his attorney failed to call trial counsel at the Ginther hearing. Respondent countered that Petitioner has made no testimonial record of appellate counsel's actions, considerations or practical restraints, and so cannot demonstrate a clear misapplication of existing federal law to justify habeas intervention.

The Constitution guarantees an indigent defendant the ineffective assistance of counsel on that first appeal as of right. Evitts v Lucey, 469 U.S. 387 (1985). While the accused has the ultimate authority to make certain fundamental decisions regarding his case, including the decision whether to take an appeal or act as his own advocate, appointed counsel on the appeal as of right does not have a constitutional duty to raise every nonfrivolous issue requested by defendant. Jones v Barnes, 463 U.S. 745 (1983).

As noted by the Michigan Supreme Court, appellate counsel in the instant case may have had a strategic reason for not calling trial at the Ginther hearing. For instance, if trial counsel had been called, his explanation for his actions might have been more believable than the testimony of the witnesses offered by appellate counsel. In addition, appellate counsel may not have wanted to call trial counsel if it appeared he had a convincing reason for not presenting the three res gestae witnesses at trial such as their credibility or relevance. Since these were strategic decisions, there is no basis to conclude that appellate counsel was constitutionally ineffective. Accordingly, it is recommended that the instant Petition for Writ of Habeas Corpus be dismissed.

For all of the above reasons, the undersigned is persuaded that there is no substantial showing of any violation of Petitioner's constitutional rights, and no basis under the highly deferential standard of the new AEDPA to find any unreasonable application of clearly established federal law by the state trial in this case.[5] Accordingly, it is recommended that the instant Petition for Writ of Habeas Corpus be dismissed.

The parties are advised that any objection to this Report and Recommendation must be filed with the Court within ten (10) days after they are served with a copy, or further appeal from Judge Tarnow's acceptance thereof is waive.

THOMAS A. CARLSON
UNITED STATES MAGISTRATE
JUDGE

DATED: 3/30/99
c: Honorable Arthur J. Tarnow
Rolf E. Berg
Jeffrey Caminsky

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[5] See the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254 (d)(1) and *Nevers v Killinger*, ___ F.3 __, (6th Cir. 1999), 1999 WL 97993, Slip Opinion 3/1/99, pp. 18-19, 38.

APPENDIX H

MICHIGAN SUPREME COURT OPINION

Docket Nos. 98984, 98985. Argued October 8, 1996 (Calendar No. 5). Decided March 25, 1997.
Charlie L. Mitchell was convicted in the Detroit Recorder's Court Samuel A. Turner, J., of second-degree murder. The Court of Appeals, SAWYER, P.J., and WEAVER and H.R. GAGE, JJ., in an unpublished opinion per curiam, affirmed the conviction, but reversed the sentence imposed on the basis of a scoring error under the sentencing guidelines and remanded for resentencing (Docket Nos. 118832, 121152). The defendant appeals.

In an opinion by Justice BOYLE, joined by Justices BRICKLEY and RILEY, the Supreme Court held:

1. A thirty-day suspension of trial counsel during a seven-month period of representation is not a circumstance making it so unlikely that any lawyer could provide effective assistance that a total or constructive denial of counsel occurred. Examination of the actual performance of counsel and prejudice is required.

2. The defendant was not deprived of the effective assistance of counsel. The defendant failed to overcome the presumption that counsel's performance was reasonable ore to show that the deficiencies alleged prejudiced the outcome of this trial. In determining whether a defendant was deprived of the effective assistance of counsel, the reviewing court must determine whether counsel's performance was objectively unreasonable, and whether the defendant was prejudiced by counsel's defective performance. Defendant's claims of ineffective assistance fail on both scores.

3. Review of a sentence is a available to the prosecution on the same terms as the defense. MCL 770.12; MSA 28.1109 expressly provides for prosecutorial

appeals of right and by leave if the protection against double jeopardy under proceedings against the defendant. The statute was enacted to give the people the same essential right to appeal and seek leave as the defendant enjoys, within the limits of the constitutional prohibition against double jeopardy.

4. Because the sentencing guidelines do not have the force of law, the Court of Appeals erred in ordering resentencing on the basis of a scoring error. A scoring error does not violate the law. A claim of a miscalculated variable in itself is not a claim of legal error. The challenge asserted in this case is directed not to the accuracy of the factual basis for the sentence, but, rather, to the court's calculation of the sentencing variable on the basis of its discretionary interpretation of the unchallenged facts. It does not state a cognizable claim for relief. Appellate courts are not to interpret the guidelines or to score and rescore the variable for offenses and prior record to determine if they were correctly applied. Guidelines are tools to aid the trial court in the exercise of its authority and a framework for the appellate courts' inquiry into the question whether the sentence is disproportionate and, hence, an abuse of the trial court's discretion.

Affirmed in part and vacated in part.

Chief Justice MALLETT, dissenting, stated that the specific facts of the case justify a presumption of ineffectiveness without inquiry into actual performance or prejudice of counsel.

Where surrounding circumstances make it so unlikely that any lawyer could provide effective assistance, ineffectiveness may be presumed without inquiry into actual performance or prejudice. The circumstances surrounding the defendant's representation precluded crucial trial preparation. The criminal justice and attorney disciplinary systems, without a doubt, combined to deny the defendant any assistance of counsel for a full thirty-four days leading to ; his trial. This denial was especially egregious because counsel had not previously conducted a private in-depth interview with his client to hear his account of the first-degree murder charge and because challenges to the admissibility of evidence had not been addressed and res gestae witnesses had not been contacted. This was not an instance where counsel chose to take no action. Rather, because of the circumstances of counsel's disciplinary suspension before trial and the trial court's refusal to assist the defendant in obtaining substitute counsel at that time, the defendant was denied his Sixth Amendment right to counsel during the critical pretrial period.

The record also does not support a knowing and intelligent waiver of counsel during the pretrial period. The defendant's subsequent expression of satisfaction with his counsel cannot be construed as a valid waiver of counsel. His motion for substitute counsel and his grievance regarding counsel's lack of pretrial representation clearly put the court on notice that he was not receiving the assistance of counsel during the critical pretrial period. A defendant's expression of satisfaction with counsel's performance at the time of trial or a later expression of dissatisfaction is not determinative of an ineffective assistance claim.

OPINION OF THE COURT

Justice CAVANAGH, dissenting, concurred with chief Justice MALLETT and noted disagreement with Justice BOYLE'S discussion of sentencing guidelines.

Justices WEAVER and KELLY took no part in the decision of this case.

FRANK J. KELLEY, Attorney General, THOMAS L. CASEY, Solicitor General, JOHN D. O'HAIR, Prosecuting Attorney, TIMOTHY A. BAUGHMAN, Chief, Research, Training and Appeals, and JEFFREY

CAMINSKY, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by ROLF E. BERG) for the defendant.

BOYLE, J. We granted leave to appeal to address whether defendant was denied his right to counsel, whether review of a defendant's sentence is available to the prosecution, and, if so, whether the Court of Appeals erred in ordering resentencing on the basis of a scoring error under the sentencing guidelines. An inference of ineffectiveness and prejudice on the basis of a thirty-day disciplinary suspension in a seven-month period of representation would violate controlling precedent of the United States Supreme Court and of this Court. Sixth Amendment claims based on defective performance must be established by showing constitutionally defective performance that undermines the reliability of the result. We hold that defendant has failed to overcome the presumption that counsel's performance was reasonable or to show that the deficiencies alleged prejudiced the out come. We also hold that review of a sentence is available to the prosecution on the same terms as the defense. Therefore, because the guidelines do not have the force of law. The Court of Appeals erred in ordering resentencing on the basis of a scoring error under the Michigan Sentencing Guidelines.[1]

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[1] We do not reach defendant's claim that the trial court erred in modifying the sentence under *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). The issue was not preserved below. Moreover, we agree with the Court of Appeals that pointing out what appeared at the time to be two options and advocating the one favorable to the defendant is not ineffective assistance. See *McMann v Richardson*, 397 US 759, 774; 90 S Ct 1441; 25 L Ed 2d 763 (1970). Because *People v Thomas*, 447 Mich 390; 523 NW2d 215 (1994), had not yet been decided, there was no clear rule prohibiting correction of a *Tanner* error by increasing the maximum term.

We vacate the order of remand and affirm the decision of the Court of Appeals in all other respects.

1. FACTS

On October 3, 1988, decedent Raymond Harlin was the victim of an altercation that took place in defendant Charlie Mitchell's apartment. Mr. Harlin was beaten with first, a blackjack, brass knuckles, a baseball bat, and a woodcarving knife before he was shot. He jumped out the window of the third floor apartment and took a cab to henry ford hospital where he died. The cause of death was gunshot wounds to the neck and back.

Defendant was charged with first-degree murder. MCL 750.316; MSA 28.548. Gerald Evelyn was appointed counsel for Mr. Mitchell on October 6, 1988, and represented him at the preliminary examination, on October 14, 1988. At the preliminary examination, the prosecution called Tyrone Thompson, and Mr. Evelyn actively interposed objections during his testimony and argued against the bindover. Mr. Evelyn represented defendant at eh final conference on February 3, 1989. On April 5, six months after appointment, Mr. Evelyn received a disciplinary suspension which expired May 5, 1989.

Trial began on May 8, 1989, Tyrone Thompson testified as he had at the preliminary hearing that defendant was the leader of a drug ring and gave the order to shoot Mr. Harlin, which was carried out by codefendant Lamont Mason. Defendant Mitchell did not take the stand, and counsel contended in closing argument that Mr. Thompson's testimony that defendant ordered the killing was equivocal and that the prosecution had failed to carry the burden of proof beyond a reasonable doubt.

Before trial, defendant wrote six letters to the trial judge, the chief judge, and others requesting removal of counsel. Defendant complained that Mr. Evelyn had not visited him at the Wayne County jail, instead only meeting with him in the "bullpen" at the Recorder's Court.

Defendant also believed that there were certain motions that Mr. Evelyn needed to make before the time to do so expired. On April 27, 1989, eleven days before jury selection was to begin, defendant appeared before the court in propria persona for a hearing on defendant's "motion for withdrawal of counsel." Defendant informed the judge on the record that he did not believe counsel was responsive to his concerns, and that counsel had been suspended from practice for thirty days from April 5, 1989, to May 5, 1989.[2] Counsel was officially reinstated on May 8, 1989, the day jury selection in defendant's trial began. That day, Mr. Evelyn advised the court that defendant wanted him removed and had filed a grievance against him. Counsel did not indicate that he was unprepared.

The judge had taken the April 27 motion under advisement pending receipt of a response from Mr. Evelyn. The issue was revisited on Tuesday, May 9, the second day of jury selection. Mr. Evelyn advised the court that "as of yesterday evening," at the conclusion of proceedings, defendant was satisfied with his representation; but, because he had been unable to visit him in the jail that evening, defendant would like him removed as counsel. Mr. Evelyn stated that he had talked with defendant on numerous occasions. The court found nothing that would warrant a change of counsel, nor would the court "abort" the proceedings.

The defendant confirmed that he had received copies of the prosecutor's file in the instant case and another pending case and his transcripts[3] in March, but stated that counsel's failure to discuss matters with him had led to specific deficiencies, which he detailed. The court directed counsel to confer with defendant and to evaluate and report back regarding any motions defendant's might wish to be heard, and Mr. Evelyn's professional opinion regarding whether they were appropriate. The motion was denied without prejudice.

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[2] Defendant had been notified by Mr. Evelyn and advised to contact counsel's partner, Myzell Sowell.

[3] Presumably the transcript of the preliminary hearing.

Thereafter, the defendant's concerns over evidence seized at the apartment building from apartment 302,[4] and the validity of the search warrant with regard to apartment 302 were resolved to defendant's satisfaction with a stipulation in which the parties agreed that none of the evidence from apartment 302 except the weapons involved would be admitted. Defendant also expressly waived his right to a Walker[5] hearing for the purpose of suppressing his statement. On Monday, May 15, 1989, Mr. Evelyn informed the court that he had received a grievance filled by the defendant on May 1. Defendant stated he was satisfied with counsel's resolution of his concerns and wanted to withdraw the grievance.[6]

Following defendants conviction on May 17, 1989, of second-degree murder,[7] MCL 750.317; MSA 28.549, defendant appealed, and the Court of Appeals remanded the case for a *Ginther*[8] hearing. Trial counsel was not called as a witness, and the trial court held that defendant had not shown objective unreasonableness, or prejudice as required by *People v Pickens*, 446 Mich 298; 521 NWd 797 (1994). Thereafter, the Court of Appeals affirmed defendant's conviction, and on the cross appeal by the people, found error in the scoring of certain offense variables under the sentencing guidelines in which ten points; had been allocated under offense variable three-"intent to Kill or Injure" (ov 3), and zero points; under offense variable four-"Aggravated Physical Injury" (ov 4), The Court of Appeals ordered the case remanded to the trial court for resentencing consistent with the panel's rescoring of twenty-five points on ov 3 and twenty-five points on ov 4. Defendant sought leave to appeal his conviction ad the order of remand in the Court. We granted leave, limiting the issues to whether defendant was denied counsel or effective assistance and whether and to what extent a prosecutor may appeal sentencing errors. 450 Mich 993 (1996).

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[4] Defendant resided in apartment 301; 302 was vacant.

[5] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

[6] The grievance was filed on May 1, 1989, before Mr. Evelyn had resolved defendant's concerns to defendant's satisfaction. In response to the judge's inquiry with regard to the grievance that had precipitated a motion to withdraw by Mr. Evelyn, defendant stated, "I would like to, you know, cancel that grievance, you know, because all the motions and everything that I requested have been answered. . . . I'm satisfied [with counsel], your Honor." This expression of satisfaction is not a waiver of a claim of ineffective assistance of counsel. Because the appropriate inquiry is not the client's evaluation of counsel's performance, but rather whether counsel is a reasonably effective advocate. "we attach no weight to either respondent's expression of satisfaction with counsel's performance at the time of his trial, or to his later expression of dissatisfaction." *United States v Cronic*, 466 US; 648, 657 n 21; 104 S Ct 2039; 80 L Ed2nd 657 (1984).

II. THE RIGHT TO COUNSEL; GOVERNING PRINCIPLES

"It has long been recognized that the right to counsel[9] is the right to the effective assistance of counsel."

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[7] The judge sentenced defendant to ten to twelve years; two months later, the judge increased the sentence to ten to fifteen years to correct the error under *People v Tanner* n 1 *supra*.

[8] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[9] The right to counsel extends to representation during any "critical stage" of the proceedings, *Coleman v Alabama*, 399 US 1, 7; 90 S Ct 1999; 26 1 Ed 2d 387 (1970), and guarantees "a fair trial and a

McMann v Richardson, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). However, because "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial, [a]bsent some effect of [the] challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *United States v Cronic*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

The cases interpreting the right to the meaningful assistance of counsel as it affects the right to a fair trial, "present a continuum." *United States v DeCoster*, 199 US Ap DC 359, 364 F2d 196 (1976). Cases on the continuum proceed from "structural or procedural impediments by the state that prevent the accused from receiving the benefits of the constitutional guarantee," *Id*, to cases where the issue is counsel's performance when he is 'untrammeled and unimpaired' by state action." *Id.* At 365. The companion cases of *Cronic* and *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed2d; 674 (1984), reflect this continuum.

CRONIC[10]

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competent attorney." *Engle v Isaac*, 456 US 107, 134; 102 S Ct 1558; 71 L Ed2d; 783 (1982). It does not require that state to provide the defendant with unlimited access to the attorney during the trial. See, e.g., *Perry v Leeke*, 488 US 272; 109 S Ct 594; 102 L Ed 624 (1989). A fortiori, it does not guarantee a defendant "a private in-depth interview" during pretrial in the place of the defendant's choosing. Post at 191.

[10] We need not dispute the fact that some circumstances, like those in *Powell v Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 258 (1932), are so egregious that prejudice will be presumed. See e.g., *Childress v Johnson*, 103 F3d 1221 (CA 5, 1997). In *Childress*, the court observed that "federal courts of appeal. . . have repeatedly emphasized that constructive denial of counsel as described in *Cronic* affords only a narrow exception to the requirement that prejudice be proved." Id. at 658, has been applied only in a "narrow spectrum" of cases where the "circumstances. . . [were]so egregious that the defendant was in effect

Cases on the continuum range from actual to constructive denial of counsel to instances where the performance of counsel is so deficient that there has been a functional denial of counsel guaranteed by the sixth Amendment. The methods of analysis employed to determine whether there has been a denial of the constitutional right likewise range from the general to the particular. *Cronic* reviews the cases in which the courts have found a Sixth Amendment violation without inquiry into whether the outcome was reliable. "The most obvious example is, of course, the failure of the state to provide any counsel whatever." *DeCoster* at 364; see also *Cronic* at 659 ("a trial is unfair if the accused is denied counsel at a critical stage of his trial"). Equally obvious would be the case in which counsel is provided but does nothing, that is, "no actual 'Assistance' 'for' the accused's 'defense' is provided," in that "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. . . " *Cronic* at 654, 659. A prophylactic approach also has been applied to cased in which the court or the state directly interferes with the attorney-client relationship by preventing counsel from rendering assistance. See e.g., *Geders v United States*, 425 US 80; 96 S Ct 1330; 47 L Ed 2d 592 (1976) (order prohibiting counsel from conferring with defendant during overnight recess while defendant was testifying); *Crutchfield v Wainwright*, 803 F2d 1103 (CA 11, 1986)(en banc) (order denying right to confer during trial recess).[11] Because these "circumstances. . . are

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denied any meaningful assistance at all." *Childress* at 1229 (emphasis added).

[11] See also *Ferguson v Georgia*, 365 US 570; 81 S Ct 756; 5 L Ed 2d 783 (1961) (statute barring direct examination of defendant and requiring defendant to testify in an unsworn statement); *Brooks v Tennessee*, 406 US 6054; 92 S Ct 1891; 32 L Ed 2d 358 (1972)(statute allowing judge in a bench trial to preclude closing argument; by defense). Such proceedings give rise to a prophylactic approach

so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," courts are "required]. . . . to conclude that a trial [under such circumstances] is unfair. . . . " *Cronic* at 658-659. In these cases, prejudice is presumed. *Id.*

Next on the continuum are the rare cases in which the circumstances are such that "although counsel is available to assist the accused during trial, the likelihood that any; lawyer, even a fully competent one, could provide effective assistance sis so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic* at 659-660; *Powell v Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932). As in instances where the state has by statute or order interfered with the attorney-client relationship, the inquiry focuses not on counsel's performance at trial, but on whether the ; surrounding circumstances are so likely to have prejudiced the accused that particularized inquiry into the fairness of the result is unjustified. Where the circumstances are not of such "magnitude," *Cronic* at 659, n 26, that there has been an "actual breakdown of the adversarial process during the trial of the case," *id* at 657-658, a defendant " can. . . . make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel." *Id.* at 666. Thus, at the far end of the continuum opposite an actual denial of counsel are those cases in which the "issue is counsel's performance." *DeCoster* at 365. Here, the inquiry is particular, not general, and the question is whether counsel's actual performance undermines confidence in the reliability of the result.

STRICKLAND/PICKENS

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because they "impair the accused's enjoyment of the Sixth Amendment guarantee by disabling his counsel from fully assisting and representing him." *Decoster* at 364. *Cronic*, however, rejects the extension of this approach where, as here, the claim is that counsel's preparation was inadequate. *Id.* At 667.

The benchmark case describing the standard for claims of actual ineffective assistance of counsel in Michigan is People v Pickens, supra at 318, which held that the right to counsel under the Michigan held that the right to counsel under the Michigan Constitution does not justify a more restrictive standard than that applied under the united States Constitution and adopted the Supreme Court's test in *Strickland*. That test requires the greatest level of factual inquiry into the actual conduct of the defense and its effect on the outcome of the trial. It places the burden on the defendant to show, with regard to counsel's performance,

> that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. . . [and] that the deficient performance prejudice the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. [*Strickland* at 687.]

In applying this test, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . " *Id.* at 689. Whereas cases at the other end of the continuum indulge a presumption that defendant was prejudiced by counsel's absence or inertness, or; by state interference or other surrounding circumstances as egregious as those found in *Powell*, cases decided under the *Strickland/Pickens* test require the defendant to overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland* at 689.

III. APPLYING *CRONIC*

The defendant argues, and the dissent agrees, that a thirty-day suspension of trial counsel during a seven-month period of representation is a circumstance making it so unlikely that any lawyer could provide effective assistance that a "a total denial of counsel during the critical pretrial period" occurred, post at 191.[12] However, in *Cronic, supra*. the Court distinguished cases recognizing a presumption of prejudice from claims of ineffective assistance based on defects in performance ground in allegations of inadequate preparation. The Court rejected the prophylactic approach and held that such claims and other specific claims of a given lawyer's incompetence at trial either individually or in combination did not justify an inference that the right to counsel had been violated.

> Under the test employed by the Court of Appeals, reversal is required even if the lawyer's actual performance was flawless. By utilizing this inferential approach, the Court of Appeals erred. [Id. at 652-653.]

In *Strickland*, in which the claims of defective performance included, inter alia, counsel's failure to investigate and present character witnesses, Justice O'Connor set forth the test applicable to such a claim. As noted above, the *Strickland* test applied in Michigan requires that a defendant claiming ineffective assistance based on defective performance has the burden of showing that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different.

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[12] The dissent believes "the suspension, combined with the surrounding circumstances and the gravity of the charge justify a presumption of prejudice," post at 193, thus arguing that the case belongs with Powell on the continuum. We disagree because the type of presumption alluded to is reserved for cases, like Powell, in which the circumstances are far more egregious than those presented here.

The Supreme Court has rejected a categorical prophylactic approach to claims of counsel's deficient performance and of failure to adequately prepare or investigate in favor of an inquiry into actual performance and prejudice. As Professors LaFave and Israel have noted, "If the Supreme Court has not clearly so indicated [previously], its subsequent opinions in. . . . *Cronic* and *Strickland*. . . . established without doubt its rejection of any such across the-board categorical approach." 2 LaFave & Israel, Criminal Procedure, 11.7, p 25 (1991 Supp). "Read in conjunction with *Cronic, Strickland* leaves no doubt that a strictly judgmental approach applies to ineffectiveness claims based upon the incompetent performance of counsel." *Id.*, 11.10 at 45. To justify reversal under both the United States and Michigan Constitutions, defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial.

The dissent attempts to avoid application of this precedent by relying on the examples given in *Cronic* of cases in which prejudice is presumed and variously characterizing the claim as a circumstance making it unlikely that any lawyer could provide effective representation, as a constructive denial of counsel, or a s a denial of counsel combined with a failure to grant a continuance. Dealing with the theories in inverse order, *Morris v Slappy*, 461 US 1; 103 S Ct 1610; 75 L Ed 2d 610 (1983), demonstrates that the suggestion that defendant's right to counsel was violated because the trial court should have granted a continuance[13] is error. In *Morris*, the defendant claimed a constitutional violation in the trial court's failure to grant a continuance when his original assigned counsel was scheduled for surgery and new counsel was substituted six days before the trial. The Court of Appeals held that the defendant's Sixth Amendment right to counsel had been violated and that this violation required reversal without any showing of prejudice. The Supreme Court reversed, finding that the Court of Appeals had "misread the record and the controlling law and announced a new constitutional standard which is unsupported by any authority." Id. at 12. Importantly to resolution of the instant case, the Supreme Court observed that:

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[13] As in *Morris*, the request was made not by counsel, but by the defendant.

> [n]ot every restriction on counsel's. . . opportunity to investigate. . . or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. . . [O]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel. [Id at 11-12.]

To the extent that the dissent characterizes Mr. Evelyn's thirty-day suspension as an eternal constraint constitutional constructive denial of counsel, the conclusion is refuted by *Cronic*, on which the dissent purports to rely. The Court overturned the court of appeals decision in *Cronic*, which held precisely, as would the dissent here, that 'when circumstances hamper a given lawyer's preparation of a defendant's case, the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel." *United States v Cronic*, 675 F2d 1126, 1128 (CA 10, 1982). The Supreme Court expressly held that the Tenth Circuit Court had erred in finding that claimed external constraint on a given lawyer's trial counsel's performance-the district court's decision to give counsel only twenty-five days to prepare for trial-created an inference of ineffectiveness and that reversal was required.

> The fact that the accused can attribute a deficiency in his representation to a source external to trial counsel does not make it any more or less

> likely that he received the type of trial envisioned by the Sixth Amendment, nor does it justify reversal of his conviction absent an actual effect on the trial process or the likelihood of such an effect. [*Cronic*. 466 US 662. n 31.]

The Court in *Cronic* also specifically found that allegations of deficient performance due to allegedly inadequate time to prepare were not the type of circumstances justifying a presumption of prejudice as in *Powell v Alabama*[14] was provided of the presence of counsel at a critical stage of the trial. Cronic at 664. Neither Cronic nor this case involves a total denial of counsel during a critical stage of the proceedings or interference by the trial court with the attorney-client relationship.[15] *Geders, supras*. The Court concluded that allegations of inadequate preparation and investigation under the Sixth Amendment arising from the court-imposed twenty-five days to prepare did not "even arguably" justify a presumption of inability to prepare to meet the bona fide issue of criminal intent. *Cronic* at 664. Likewise, an allegation of deficient performance stemming from a thirty-day suspension coupled with six-months time for preparation does not justify a presumption.[16] These are not circumstances making it so likely that "no lawyer could provide the respondent with the effective assistance of counsel required by the Constitution," *Id.*, that examination of the actual performance of counsel or prejudice is irrelevant.[17]

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[14] The defendants in *Powell* had no counsel until the morning of trial, when an attorney from another state, who was unfamiliar with Alabama procedure, acknowledged his willingness to provide representation despite his unpreparedness. *Id.* at 57.

The dissent's application of *Powell* to defense counsel's thirty-day suspension is factually inapt. Four young, ignorant, and illiterate "negroes" were arrested by an Alabama Sheriff's posse for the rape of two white girls in 1931, were brought to town into the midst of a hostile crowd, and "every step taken from the arrest and arraignment to the sentence was accompanied by the military. . . in an atmosphere of tense, hostile, and excited public sentiment." *Id.* at 51. None of the defendants was a resident of Alabama, and the trial court never inquired whether they had counsel, the ability to obtain counsel, or needed counsel appointed. *Id.* at 52. The trial court appointed for arraignment "all the members of the [Alabama] bar" to assist in the defense. *Id.* at 49.

The defendants were hurried to trial with counsel who had no opportunity to prepare or investigate. The Court found that counsel's representation then proceeded "pro forma," so that the "defendants were not accorded the right of counsel in any substantial sense." *Id.* at 58. The court reasoned that:

> During perhaps the most critical period of the proceedings against these defendants, that is to say, *from the time of their arraignment until the beginning of their trial*, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself. [*Id* at 57 (*emphasis added*).]

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[15] Defendant was not unrepresented during any critical stage of the proceedings. Defendant was represented at the preliminary examination, during trial, and during all critical stages through sentencing. In fact, in Mr. Sowell's assumption of the case, there was no period of time when the defendant was not represented. Counsel was not absent at any specific time when "counsel's absence might derogate from the accused's right to a fair trial . . . as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *Coleman*, n 9 *supra* at 7 (citations omitted). Even if defendant and his mother were fully creditable and Mr. Evelyn did not contact the witnesses and only met with the defendant three times, this is not a "denial of counsel" during a critical stage. Rather, these are allegations of deficient performance by counsel that must meet the *Strickland* standard.

[16] Given the dissent's recognition that a *Powell*-like presumption obviating an inquiry into actual performance or prejudice applies "[w]hen the surrounding circumstances make it so unlikely that any lawyer could provide effective assistance" *post* at 186 (emphasis added). The fallacy in applying *Powell* to a thirty-day period of assumed lack of preparation during a seven-month period of representation is obvious. Would *any* lawyer who had represented the defendant at the examination, had the benefit of discovery, and six months time to prepare necessarily be ineffective to try this relatively uncomplicated five-day trial if illness had precluded preparation for trial for the thirty-day period preceding trial, if a family emergency had absorbed all time and energy for that period, or, more realistically, if the demands of another, more complex trial had prevented preparation?

IV. APPLYING STRICKLAND

A. THE GINTHER EVIDENCE

There is no factual basis for a conclusion that counsel's performance was constitutionally deficient and undermines confidence in the reliability of the verdict:

> "A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court. . . which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately," [*People v Ginther* 390 Mich 436, 442-442; 212 NW2d 922

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[17] While the dissent states that "the criminal justice and attorney discipline systems, without a doubt, combined to deny Mr. Mitchell any assistance of counsel," post at 190, the disciplinary system is not the creature of the criminal justice system, and neither the government nor the trial court has control over or responsibility for the timing of an order of discipline. Nonetheless, the extent that the dissent views the situation as analogous to a statute or order which impairs the attorney-client relationship, we note that there is no claim that the order disabled counsel from fully representing him at trial. The interests of both systems as well as those of criminal defendants require that a claim of ineffective assistance based on specific deficiencies of counsel stemming from disciplinary action be treated as a claim that, by its "very nature, require[s] courts to evaluate the attorney's performance and the effect of that performance on the reliability and fairness of the proceeding." (Brennan, J., concurring in *Strickland* at 702)(that claims of specific attorney error were not "cases in which the surrounding circumstances [make] it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial'")

(1973)].

No record was made regarding what Mr. Evelyn did or did not do, or whether Mr. Evelyn knew of the alleged eyewitnesses.[18] Counsel's failure to call witnesses is presumed to be trial strategy, *Strickland, supra Ginther; supra*, and Mr. Evelyn was not called to testify at the *Ginther* hearing. Testimony of the three witnesses who were found by the trial court to be "inconsistent and contradictory of one another" did not exclude the hypotheses of adequacy.

The dissent offers no support for the conclusion that there was any legally viable challenge to the admissibility of the evidence,[19]and the witnesses subject to being called were not eyewitnesses. While the dissent concludes that Mr. Evelyn failed to investigate and that "no reasonable trial strategy exists" for this "failure," post at 189, n 4, the dissent offers no analysis with respect to how these witnesses might have made a difference at trial.

> [T]he Sixth Amendment does not require that counsel do what is impossible or unethical, if there is no bona fide defense to the charge, counsel cannot create one and may disserve the interest of his client by attempting a useless charade. [*Cronic* at 656, n 19.]

The only bona fide jury issue open to competent defense counsel on these facts was that the government's witnesses were unworthy of belief and that the state had failed to carry the burden of proof.[20] Evelyn argued,[21] an argument that persuaded the trial court to direct a verdict on first-degree murder.[22]

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[19] Although Mr. Evelyn stated at trial that he had met with the defendant on numerous occasions and more than once at the courthouse, the dissent accepts, without any testimony from Mr. Evelyn at the *Ginther* hearing, defendant's allegation that the meetings were useless because he was hard of hearing.

[19] As in *Cronic*, competent appellate counsel has failed to identify any bona fide grounds to suppress the evidence.

B. PERFORMANCE/PREJUDICE

In Pickens, we adopted the test set forth by the United States Supreme Court in *Strickland*. The reviewing court is to determine (1) whether counsel's performance was objectively unreasonable, and (2) whether the defendant was prejudiced by counsel's defective performance. *Id.* at 687. The first prong requires that counsel make "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The second requires that 'counsel's ineffective assistance must be found to have been prejudicial in order to reverse an otherwise valid conviction." *Pickens* at 314.

Defendant's claim of ineffective assistance fail on both scores. Nothing in the record indicates that counsel erred in not calling witnesses who were not present when the victim was shot and whose testimony, at best, would have affected only matters collateral to the prosecutor's theory that the defendant, as leader of a drug ring, gave the order to kill Mr. Harlin.[23]

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[20] The dissent argues that the testimony of witnesses offered at the *Ginther* hearing could have been useful to undermine Mr. Thompson's testimony. *Post* at 194, n 8. As noted below, we defer to the trial judge's determination that the testimony offered was contradictory and would not have altered the outcome.

[21] The prosecutor argued that Mr. Mason shot Mr. Harlin at defendant's direction according to Mr. Thompson's testimony. Counsel argued that the prosecutor's witnesses were not credible, that Thompson's testimony was equivocal, and that the burden of proof had not been sustained because the evidence amounted to nothing more than a 'ball of confusion." Counsel effectively cross-examined the witnesses consistent with his theory of the case. The jury convicted defendant of second-degree murder after Mr. Evelyn successfully moved for a directed verdict that the evidence was insufficient on the elements of first-degree murder.

[22] Counsel also succeeded in excluding damaging evidence from apartment 302.

Any claim that the probability is high that had Nelson and Woodson been called defendant would have been acquitted underscores the record deficiencies the dissent ignores. Whether the witnesses were known to counsel or, if known, would have been deemed by him to be believable by the jury is unknown. It is far from evident, however, that the testimony of two persons who allegedly happened to be merely present playing chess in a dope house at 10:00 P.M. would be credited by the factfinder. For precisely this reason, Mr. Evelyn's testimony was critical to a proper assessment of the claim. As the Court observed in *Strickland*:

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[23] There was unrebutted testimony that defendant ordered the shooting. Testimony that Thompson came in with the gun could not rebut this testimony. The third witness, Mr. Mason, was a codefendant and the alleged shooter, and was therefore unavailable to testify in defendant's case until he took the stand in his own case before a separate jury, where he testified the gun belonged to Mr. Thompson. Theoretically, had Mr. Mason's testimony been beneficial to defendant Mitchell's case, Mr. Evelyn could have moved to reopen the case. There are several reasons why this argument does support the claim that the failure to move to reopen could be found objectively unreasonable on this record. First, given that the two defendants had separate juries and severance is only mandated where it is "necessary to avoid prejudice to substantial rights of the defendant," MCR 6.121(C); *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994), counsel would presume Mason's testimony would be harmful to Mitchell. Second, we cannot evaluate Mason's trial testimony because the record before us does not include Mr. Mason's trial testimony before the *Mason* jury. Third, because Mr. Evelyn was not called at the *Ginther* hearing, we have no way of knowing how he evaluated the situation.

> [W]hen a defendant has give counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to purse those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. [*Id.* at 691]

Counsel may have failed to call the witnesses because he did not know about them. Alternatively, he may not have called them because of a familiar strategic consideration, namely, that calling witnesses whose testimony is not believable (even with regard to peripheral matters), may jeopardize an otherwise viable defense. On this record, there is no basis to conclude that the failure to present these witnesses was error or that, had the witnesses been presented, "the factfinder would have had a reasonable doubt respecting guilt." *Strickland, supra* at 695.

This dissent's conclusion that Mr. Evelyn's performance at trial is irrelevant, *post* at 199,[24] ignores teaching of the United States Supreme Court that "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such. If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance." *Cronic* at 657, n 21.[25]

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[24] Of course, calling this a "total denial of counsel" misleading where counsel was not absent during the entire seven-month pretrial phase, but only for thirty days of that phase.

[25] Like all attorneys eligible to receive appointments in Detroit Recorder's and Wayne Circuit Courts, Mr. Evelyn had completed the requirements of the criminal advocacy program designed to assure more than minimal competence for attorneys representing indigent attorneys. Indeed, in September 1996, Mr. Evelyn was selected to teach one of the eight seminars offered in the 1996 Detroit/Wayne

Unless the defendant shows a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, a Sixth Amendment violation has not been established.

The dissent would improvidently extend a remedy to a defendant who received constitutionally effective assistance and who has not been wronged in any real sense.[26] As the Court observed in *Strickland*, when rejecting a presumption of ineffectiveness regarding alleged individual deficiencies in performance by counsel representing defendants in a criminal trial.

> Criminal trials resolved unfavorable to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected.

County Criminal Advocacy Program. That program has been in existence since 1983 "for the purpose of developing, expanding, and maintaining high professional standards of representation in felony cases." *Detroit/Wayne County 1996 Criminal Advocacy Program Announcement*. It was "designed and developed under the joint auspices of judges, members of the private bar, police, prosecutors, and defense attorneys." Id. In order to continue receiving appointments in Recorder's Court, attorneys with less than ten years experience must attend six of the ten seminars offered each year, and attorneys with over ten years experience must attend at least two.

[26] The dissent would adopt its categorical approach to ineffective assistance for failure to investigate or prepare because of lack of time despite *Cronic's* warning "against using any rule of thumb. . . . in determining how much time was needed for defense preparation." LaFave & Israel, *supra*, 11.8 at 28. It is unclear whether this would create a presumption that the prosecutor would be obligated to rebut or a rule of reversal per se. The Supreme Court had adopted a rebuttable presumption of prejudice in some cases, thereby shifting the burden of showing absence of prejudice to the prosecution. See e.g., *Cuyler v Sullivan*, 446 US 335; 100 S Ct 1708; 64 L Ed 2d 333 (1980). Even under this approach, the defendant's claim here would fail because the record establishes that he suffered no prejudice from the suspension or failure to call witnesses.

> Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. [*Id.* at 690.]

Justice RILEY'S observation in *Pickens* is also apt:

> [T]he inevitable result of such a formulation would be an explosion of civil litigation in which juries would be permitted to award damages to a defendant who by definition has bee reliably found guilty. . . . [t]hat such a perversion of the truth-seeking function of criminal trials was not intended by the Michigan Constitution is beyond question. [Id. at 325-326, n 31.]

V. THE LIMITS OF APPELLATE REVIEW

A reality underlying the *Cronic-Strickland* continuum is the inability of an appellate court to evaluate in hindsight the infinite variables of trial court practice and the "countless ways to provide effective assistance in any given case." Id. at 689. For the same reason, the attorney-client privilege is waived and the trial lawyer is a necessary witness on the issue of inadequacy of counsel:

> At the hearing, the witness, Williams and Williams' lawyer are all necessary witnesses. The lawyer is necessary because even the truth and further elaboration of the witness' assertions would not necessarily require a finding of inadequacy of counsel. By putting in at the trial, Williams waived the attorney-client privilege. [*People v Michael Williams*, 391 Mich 832, 832 (1974).][27]

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[27] "It is well established that a defendant in a criminal case who asserts ineffective assistance of counsel waives by doing so the attorney-client privilege." *Howe v Detroit Free Press*, 440 Mich 203, 236; 487 NW2d

Absent any presentation of counsel's testimony to the trial court, or an inquiry into whether defendant was prejudiced by the suspension, reversal of the trial court's conclusion that the defendant failed to carry his burden at the *Ginther* hearing would be postulated not on truth but on pure conjecture. The dissent's approach, despite the holdings in *Williams, Ginther, Cronic, Strickland, Pickens, and People v Pubrat*, 451 Mich 589; 548 NW2d 595 (1996), would permit defense lawyers to be "found guilty" of ineffective assistance without ever being heard from and face the unenviable prospect of looking to the prosecutor to protect them at the *Ginther* hearing.[28]

We do not know that Mr. Evelyn did not "exert at least some effort to explore the truth. . . ." *Post* at 191, n 7. We do not even know that Mr. Evelyn prepared by holding the preliminary examination and obtaining discovery and that he obtained a directed verdict of not guilty of first-degree murder. Mr. Evelyn should not be deemed guilty of malpractice without his having been given the opportunity to be heard, nor should the defendant be afforded a new trial without record basis for a finding that his conviction was unfairly obtained.[29]

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374 (1992) (separate opinion of LEVIN, J.). See also *Tasby v United States*, 504 F2d 332, 336 (CA 8, 1974).

[28] Again, however, the dissent could be interpreted to advocate allowing an appellate court to simply presume ineffective assistance upon the allegation of inability or failure to prepare so that evidence of prejudice from either party would be wholly irrelevant. We reject this result because, by obviating the *Ginther* procedure in many cases, it would violate *Strickland's* admonition to assess whether "a particular decision not to investigate [is reasonable], applying a heavy measure of deference to counsel's judgments." *Id.* at 691.

[29] The dissent attempts to avoid our holding in *People v Pubrat, supra*, that the test for claims of ineffective assistance stemming from disciplinary suspension is that which is set forth in *Strickland* by suggesting that there is a difference between suspended lawyer who

In the real world, defending criminal cases is not for the faint of hear. Lawyers must fulfill ethical obligations to the court, zealously advocate the client's best interests (which includes establishing that they, and not the client, are in charge of making the professional decisions), and protect themselves against grievances[30] and claims of malpractice. Lawyers will inevitably make errors in the process, but, because both cases and attorneys come in an infinite variety of configurations, those errors can only rarely be defined "with sufficient precision to inform defense attorneys correctly just what conduct to avoid." *Strickland* at 693. Thus, the Sixth Amendment guarantees a range of reasonably competent advice and a reliable result. It does not guarantee infallible counsel.

An inference of constitutional ineffectiveness cannot be established on the basis of the "circumstance" of counsel's thirty-day suspension during seven months of representation, without any inquiry into the conduct of the

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continues to represent a defendant and a lawyer who it is assumed did not prepare during the period of suspension. Aside from the fact that this approach discourages disciplined lawyers from abiding by their obligation not to practice during a period of suspension, the dissent offers no explanation for why prejudice should be presumed during one temporary suspension, but not the other. Moreover, given the fact that a suspended or disbarred attorney is not prohibited from working in the capacity of an "agent, clerk or employee" of a licenses attorney, *Grievance Administrator v Chappell*, 418 Mich 1202 (1984), there is neither reason nor justice to create an inference that defendant Mitchell received "no counsel at all during this period." *Post* at 191, n 6.

[30] The dissent appears to attach weight to defendant's expressions of discontent, and to his having filed a grievance against Mr. Evelyn and requested new counsel and an adjournment of trial. Post at 197-198. While the trial court would have been well advised to have made an earlier and more complete record, regarding defendant's complaint, the weight afforded to these complaints betrays naivete'. Grievances against attorneys and judges may be legitimate. They are also prompted by a desire for a new judge, a new attorney, or an adjournment, and are routine incidents in Recorder's Court.

trial or any record being developed regarding counsel's actual preparedness and its effect on the result.

IV. APPELLATE COUNSEL

Defendant also claims appellate counsel was ineffective in failing to call trial counsel at the *Ginther* hearing. There is no better evidence for why this claim should be rejected than the dissent's holding that ineffectiveness may be inferred without the inquiry into performance and prejudice, which presumes that counsel's conduct fell within the wide range of reasonable professional assistance.

Appellate counsel had an obvious strategic reason for not calling trial counsel. That reason was that if trial counsel had been called, his explanation for his actions might have been more believable than the testimony of the witnesses offered at the *Ginther* hearing because he determined trial counsel would have testified that he did not have notice of the witnesses or that he had a strategic reason for not presenting them (such as credibility or relevance). In any event, because these are strategic decisions, there is no basis to conclude appellate counsel was constitutionally ineffective.

VII. PROSECUTOR'S RIGHT TO APPEAL

A. SENTENCING REVIEW

In *People v Coles*, 417 Mich 523; 339 NW2d 540 (1983), this Court, by unanimous vote of all justices participating,[31] recognized a defendant's right to appellate review of a sentence. The Court held:

> [A] sentence following a conviction is as

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[31] Justice BOYLE did not participate.

> much a part of the final judgement of the trial court as is the conviction itself. Since the Court of Appeals has jurisdiction to hear appeals of final judgments of trial courts, . . . the Court of Appeals has jurisdiction to hear appeals involving a review of a defendant's sentence. [*Id.* at 535.]

In 1988, the Legislature amended MCL 770.12; MSA 28.1109 to expressly provide for prosecutorial appeals of right and by leave "if the protection against double jeopardy [under the state and federal constitutions] would not bar further proceedings against the defendant. . . ." Reviewing the statute last term, we held that it was enacted" to give the people the same essential right to appeal and seek leave as a defendant enjoys, within the limits of the constitutional prohibition against double jeopardy." *People v Torres*, 452 Mich 43, 55; 549 NW2d 540 (1996). It follows that both the prosecutor and the defendant may appeal the sentence under Coles, supra; MCL 770.12; MSA 28.1109.[32]

B. REVIEW OF GUIDELINES CALCULATIONS

Defendant argues, essentially, that a defendant's right to appeal a sentence on the basis of an erroneous guidelines score is grounded in the due process right to be sentenced on the basis of accurate information. *Townsend v Burke*, 334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948). Because due process protects only individuals against state authority, defendant contends that the state cannot assert a right to a rule of symmetry with regard to sentencing appeals.

The holding in *Townsend* is inapposite. First, in *Townsend*, the United States Supreme Court held that there is no basis for the assertion of a due process right to be sentenced on correct information unless the sentence is based on an "extensively and materially false" foundation. *Townsend, supra* at 741. The misapplication of the guidelines typically advanced is not premised on a false foundation. The claim advanced is that the guidelines were misapplied because the instructions were not properly interpreted or because an undisputed foundation is "sufficient" to support the score. These claims do not rest on allegations of falsity or lack of factual foundation. They would be claims of legal error if guidelines had the force of law.[33]

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[32] An appeal by a defendant "who pleads guilty or nolo contendere shall be by leave of the court. . . . " Const 1963, art, ratified November 8, 1994, effective December 24, 1994.

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[33] In the federal system, for example, although the decision of a federal judge not to depart from the guidelines is an unreviewable exercise of the trial court's discretion, miscalculation of the guidelines range is subject to appellate review as *legal* error. 18 USC 3742 (f)(1)(authorizing remand with instructions where a trial court applies guidelines incorrectly); *United States v Grandmaison*, 77 F3d 555, 560 (CA 1, 1996); *United States v Gifford*, 17 F3d 462, 473 (CA 1, 1994); *United States v Hilton*, 946 F2d 955, 957 (CA 1, 1991). Departures from the federal guidelines are reviewed only for abuse of discretion. *Koon v United States*, 518 US 81; 116 S Ct 2035; 135 L Ed 2d 392 (1996).

More fundamentally, reference to the constitutional guarantee of procedural due process at sentencing does not address the principal question presented, which is whether either a defendant or a prosecutor has a substantive right to challenge a guideline miscalculation or misinterpretation. which does not have the force of law. Unlike the federal system, in which the sentencing guidelines are substantive law promulgated pursuant to an act of Congress, 28 USC 994(a) (authorizing promulgation of federal sentencing guidelines by United States Sentencing Commission), or those sister states in which guidelines have been adopted by the legislature, current guidelines used by the trial courts in Michigan exist solely as a result of Administrative Order No. 1988-4.[34] As explained in *People v Milbourn*, 435

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[34] Careful evaluation of the effect on trial and appellate courts will undoubtedly attend legislative adoption of sentencing guidelines pursuant to 1994 PA 445; MCL 769.32 *et seq*.; MSA 28.1097(3.2) *et seq*. The Court of Appeals experienced a 132 percent increase in appeals in criminal cases between 1988 and 1994. This Court has not published a single opinion remanding a sentence for failure to meet the requirements of proportionality since *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and my research indicates that only two such cases have been remanded or reversed by order. This research also indicates that the Court of Appeals has published approximately fifteen such reversals during the same period, with only six since *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994). On the other hand, a conservative estimate based on very rough research indicates that during the six years since *Milbourn* was decided this Court has reviewed well over one thousand cases in which this issue was raised. Given the administrative burden of the appeals generated and the limited nature of relief available, the benefit from such allocation of resources is, at best, unclear. The federal guidelines have been widely criticized for the rigidity with which they constrain trial court discretion and for the burden imposed on appellate courts. See, e.g., Freed, *Federal sentencing in the wake of guidelines: Unacceptable limits on the discretion of sentences*, 101 Yale L J 1681 (1992); Schulhofer, *Assessing the federal sentencing process: The problem is uniformity, not disparity*, 29 Am Crim L R 833 (1992); Weinstein, *A trial judge's reflections on departures from the federal sentencing*

Mich 630, 656-657; 461 NW2d 1 (1990):

> [W]e believe that the second edition of the sentencing guidelines is the best "barometer" of where on the continuum from the least to the most threatening circumstances a given case falls.
>
> Nevertheless, because our sentencing guidelines do not have a legislative mandate, we are not prepared to *require* adherence to the guidelines. [Emphasis in the original.]

Simply stated, because this Court's guidelines do not have of law, a guidelines error does not violate the law.[35] Thus, the claim of a miscalculated variable is not in itself a claim of legal error.[36]

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guidelines, 5 Fed Sent Rep 6 (1992); Alschuler, *The failure of the sentencing guidelines: A plea for less aggregation*, 58 U Chi L R 901 (1991). This criticism may have been part of the impetus for the decisions in *Williams v United States*, 503 US 193; 112 S Ct 1112; 117 L Ed 2d 341 (1992), and *Koon*, n 33, *supra*, which clearly return some of the trial court's ability to individualize sentences and reject the concept of automatic reversal for guideline error.

[35] For the same reason, error cannot be predicated on a claim that the instructions were misinterpreted.

[36] Errors in calculation of sentencing variables and even reliance upon some invalid factors in arriving at a sentence that departs from the guidelines do not necessarily invalidate a sentence under federal law. The *Williams* Court explicitly held that an appellate court need not invalidate a sentence on the basis of an improper factor where the prosecution can establish that the sentence would have been the same absent the improper consideration. *Williams*, n 34 *supra* at 203; accord *People v Hernandex*, 443 Mich 1, 12 n 13; 503 NW2d 629 (1993). It appears that, under federal law, a sentence will be insulated from reversal on appeal if the judge states on the record that the sentence would have been the same had the judge only considered proper factors. *Id.* Parham, *Grist for the mill of sentencing guideline reform:*

We have long recognized and recently reaffirmed that a sentence may be set aside only when it is invalid. *People v Whalen*, 412 Mich 166, 169-170; 312 NW2d 638 (1981); *In re Jenkins*, 438 Mich 364; 373; 475 NW2d (1991). In *Jenkins*, we observed in dicta that the defendant may challenge the scoring of the sentencing guidelines under MCR 6.429; and in *People v Hernandez*, 443 Mich 1; 503 NW2d 629 (1993), and *People v Walker*, 428 Mich 261; 407 NW2d 367 (1987), we discussed preservation of guidelines scoring issues. To the extent that our decisions have been construed to authorize review and reversal for scoring errors or errors of misinterpretation, *Milbourn's* correct observation that guidelines do not have the force of law is controlling. Such relief is unavailable.[37] The

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Williams v United States, 28 Wake Forest L R 487 (1993). Even though the *Koon* Court held that federal judges may not base departures on factors expressly forbidden in the federal guidelines, *Williams* provides that a sentence will not be overturned where the error is harmless. *Williams*, n 34 *supra* at 203 (citing F R Crim P 52[a]). The Court reasoned that a sentence can still "be reasonable' even if some of the reasons given by the district court to justify the departure from the presumptive guideline range are invalid, provided that the remaining reasons are sufficient to justify the magnitude of the departure." *Id.* at 204.

[37] As in *Walker*, an "effective challenge" involving guidelines is a challenge to the accuracy of the factual information on which the sentence was based, a challenge grounded in the due process clause under *Townsend*. *Walker* authorized a review procedure for the preservation of sentencing appeals. *Hernandez* limited *Walker* by holding that an appellate court is not compelled to grant a motion to remand where there was "evidence supporting the judge's initial scoring of the sentencing guidelines variable . . . ." *Id* at 3. As in *Walker*, the challenge in *Hernandez* centered on the factual accuracy of the basis for the sentence. Properly understood, *Hernandez* affirmed that the accuracy of the information and the adequate notice in the presentence report gave rise to reviewable claims on appeal. It did not authorize a challenge on the basis of the judge's interpretation of the facts underlying the sentence and the scoring decisions based on it, that is, the manner in which the judge scored the variables.

challenge her asserted is directed not to the accuracy of the factual basis for the sentence, but, rather, to the judge's calculation of the sentencing variable on the basis of his discretionary interpretation of the unchallenged facts. The challenge does not state a cognizable claim for relief. There is no juridical basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables.[38]

As emphasized in *Milbourn*, the guidelines are vehicles to assist the trial judge regarding where a given defendant falls on the sentence continuum recognized by *Milbourn*. Where the guidelines calculation differs from the trial court's intended sentence, the judge is alerted that the sentence falls outside a normative range and should be evaluated to assure that it is not unfairly disparate, has a rational basis, and is not disproportionate.[39] On postsentence review, guidelines departure is relevant solely for its bearing on the *Milbourn* claim that the sentence is disproportionate.[40] Thus, application of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate.[41]

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[38] My brother CAVANAGH'S separate state prompts a response. The fact that some persons cannot see the point of the constitutional limits of judicial authority is precisely the point of repetitively pointing it out.

[39] Where an error was based on an "extensively and materially false" foundation, *Townsend* requires review. We have not decided the issue whether such a challenge may be asserted by a prosecutor on behalf of a crime victim under Const 1963, art 1, § 24.

[40] Contrary to defendant's claim, we have never held that the sentencing guidelines provide a clear basis on which sentences might be overturned on appeal. Moreover, in requiring judges to state their reasons for departing from the guidelines, the order *does not* speak of appellate review, but, rather, of the Sentencing Guidelines Advisory Commission's use of that information in generating analysis of whether the guidelines are working effectively.

Appellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied. Guidelines are tools to aid the trial court in the exercise of its authority and a framework for the appellate courts' inquiry into the question whether the sentence is disproportionate and, hence, an abuse of the trial court's discretion. The Court of Appeals erred in reversing defendant's sentence.

VIII. CONCLUSION

For the reasons stated above, we affirm the decision of the Court of Appeals that defendant was not deprived of the effective assistance of counsel and vacate its order remanding this case to the trial court for resentencing.

BRICKLEY and RILEY, JJ., concurred with BOYLE, J. MALLETT, C.J. I respectfully dissent from parts II through V of the majority opinion. Counsel's disciplinary suspension precluded him from preparing defendant Mitchell's defense during the critical period leading to his first-degree murder trial. Mr. Mitchell's repeated attempts to obtain substitute counsel went unheeded and his trial began, as scheduled, on the morning that his attorney's suspension expired. Consequently, defendant was denied the assistance of counsel during the critical period leading to trial.

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[41] To ask whether it is a misapplication of the guidelines to score points for criminal sexual conduct under OV 12, where prior penetrations were not part "of the same transaction," is to ask a question whose answer has no legal relevance on appeal. As an inquiry about what the guidelines committee had in mind regarding assessment measures that do not have the force of law, the inqury, at best, asks for an opinion about how the majority of

I would hold that the specific facts of this case justify a presumption of ineffectiveness without inquiry into actual performance or prejudice. *United States v Cronic*, 466 US 648, 653; 104 S Ct 2039; 80 L Ed 2d 657 (1984), *Powell v Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932). I would therefore reverse the Court of Appeals decision and remand for a new trial.

I.
BACKGROUND

The prosecution's theory was that the defendant was the leader of a drug-trafficking ring and that he had been effectively in charge of all that took place in his apartment on the night of Raymond Harlin's death. Defendant was depicted by the prosecution witnesses as a midlevel drug dealer. His apartment allegedly served as a wholesale warehouse for several street-level sellers who conducted illicit drug sales in the first floor lobby of the apartment building. Harlin had allegedly been working for the defendant.

The pertinent events surrounding Mr. Harlin's death occurred in the defendant's apartment about 10.00 P.M. Those initially present were defendant Mitchell, Mr. Harlin, codefendant Antonio Moore, and two friends of the defendant, Serena Nelson and Brent Woodson. There was no evidence that either Nelson or Woodson were involved in the alleged drug ring.

The only evidence at trial concerning the start of the altercation was the statement Mr. Mitchell gave to the police indicating that the fight had started in the kitchen after Moore had become angry at the way the victim was staring at him. At the *Ginther*[1] hearing, Woodson and

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Nelson also testified that the fight had broken out between Moore and Harlin in the kitchen over somebody looking at somebody strangely or making someone feel uncomfortable. Woodson testified that he never saw Mr. Mitchell participating in the fight, nor did he hear him encouraging anyone to shoot anyone else. Nelson and Woodson left the apartment some time after the altercation began and shortly after Tyrone Thompson and Richard Puryear arrived.

Both Thompson and Puryear testified at the trial. They were involved in drug sales from the apartment lobby, although, apparently, the defendant was not their supplier. Thompson, the prosecution's primary witness, testified that Harlin was already bloodied when he arrived at the apartment. He stated that a gun was in plain view on a window ledge and that the defendant would shoot Harlin. At the *Ginther* hearing, Nelson and Woodson disputed this testimony, both indicating that they never saw a gun in plain view on the window sill and that Thompson had the weapon in his possession when he entered the apartment.

Thompson testified that the heard the defendant exclaim, "Shoot a hole in his heart."[2] Soon after this occurred, codefendant Lamont Mason, who ultimately fired the shots, and Nehemiah Anderson arrived. Apparently, Mason was involved in the defendant's drug business and Anderson had come to the building to purchase drugs. Thompson testified that by the time Mason arrived, he thought that the situation was calming down. Consequently, he laid down the gun that he had been holding. To his surprise, after laying down the gun, Mason picked it up and shot Harlin in the neck and back.

Harlin jumped out the third floor window. Amazingly, he was able to summon a cab, taking it to

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[2] The statement may have been, "[S]hoot the [whore] in the heart," or, as defendant's attorney contended, "I should shoot this [whore] in the heart.

Henry Ford Hospital where he later died of gunshot wounds of the neck and back.

Defendants Mitchell, Mason, and Moore were all charged with first-degree murder. Mason and Moore moved for separate trials. The court ruled that separate juries would hear defendant Mitchell's and codefendant Mason's cases, while codefendant Moore opted for a bench trial.

The defendant did not testify or present any witnesses. At the close of proofs, his attorney moved for a directed verdict. The court partially granted the motion by reducing the charge to second-degree murder. MCL 750.317; MSA 28.549. The jury convicted defendant that charge. Lamont Mason, who everyone seems to agree fired the shots, was acquitted by his separate jury. The court found Antonio Moore, who according to the defendant and codefendant Mason, was the primary aggressor in Harlin's beating, guilty of felonious assault and placed him on probation.

Defendant wrote numerous letters complaining about Mr. Evelyn's representation. For example, in a letter to Judge Farmer he complained that "I have been locked up for 5 months and not once have my lawyer took time out to talk to me . . . .[I]f I can't express to Gerald K. Evelyn what happen on the night this incentdent occur [sic], he will not know the best stradaegy [sic] of what and how to fight this case . . . . I am tired of being in the dark & knowing he's in the dark." He also complained of not having his transcripts, of repeated efforts to contact counsel, and of counsel's failure to file necessary pretrial motions.

A hearing was held on defendant's complaints eleven days before the scheduled trial date. At the hearing, defendant requested a change in counsel and an adjournment to allow time for new counsel to prepare. He also informed the court of Mr. Evelyn's disciplinary suspension. The court never ruled on Mr. Mitchell's request, instead taking the motion under advisement in order to allow Mr. Evelyn to respond. Mr. Evelyn had been notified of the hearing, but neither he nor his law partner appeared.

Mr. Mitchell renewed his complaint on the second day of jury selection, after counsel failed to visit him as promised the previous evening. Defendant explained his concerns to the court:

> Well, from the very beginning, you know, Mr. Evelyn promised to talk with me. He has failed to talk with me on every occasion that he promised. He has failed to make any motions for me, and he's failed to talk with my mother, which she has written many letters and calls, and went to his office, also, left word with his secretary.
>
> And he also showed up an hour late on my final conference and by him letting me know yesterday that he was going to come over and talk with me and by him failing to do that, I just, I feel it's just incompetent.

After the court asked if defendant's complaint was that counsel had not visited him at the jail as many times as he would have liked, Mr. Mitchell responded, "Yes. Never seeing me at all." Counsel responded by explaining that he had supplied defendant with all the records that he had requested. Although Mr. Mitchell agreed, he stated that reading the records without his counsel's assistance left him feeling that he was being "misrepresented." He further stated that "[t]he only time I meet his is in the courtroom, or brief discussion in the bullpen with plenty of other people in the bullpen. I just don't see how courts can say that that's true fairness." Mr. Mitchell, who wrote a hearing aid, also complained that when counsel met with him in the courtroom or in the bull pen, he had difficulty hearing most of what counsel said. After hearing these complaints and holding a lengthy discussion about motions that defendant felt should be made on his behalf and directing counsel to meet with defendant that afternoon, the court denied the motion for substitute counsel.

On the sixth day of trial, Mr. Evelyn acknowledged his receipt of a grievance filed by defendant with the Attorney Grievance Commission and formally requested to withdraw. For reasons discussed more fully in part IV, the request was denied.

After his conviction, the defendant and the prosecutor appealed. The Court of Appeals consolidated the appeals and remanded for a *Ginther* hearing. After the hearing, the Court rejected defendant's Sixth Amendment claims, holding that Mr. Mitchell had not met the standard for ineffective assistance and had abandoned any claim of error by failing to continue his objection to counsel's performance midtrial.

After providing a brief overview of the right to the effective assistance of counsel in part II, part III will address how the circumstances in this case led to a denial per se of Mr. Mitchell's Sixth Amendment rights. Finally, part IV will explain that Mr. Mitchell's expression of satisfaction with counsel's midtrial performance cannot act to waive or abandon his ineffective assistance claim.

II.
THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense. [US Const, Am VI.]

Similarly, the Michigan Constitution states that, "[i]n every criminal prosecution, the accused shall have . . .

assistance of counsel for his defense . . . . " Const 1963, art 1 § 20.

The constitutional guarantee of the assistance of counsel is a fundamental component of our criminal justice system. The assistance of a competent attorney is essential because it provides the means through which the other rights of the accused are secured. Consequently, without counsel's assistance, the right to a trial would mean little. *Chronic, supra* at 653. Notable federal and Michigan jurists have long recognized the importance of the right to the assistance of counsel. Justice Sutherland, in his opinion in *Powell, supra* at 68-69, emphasized:

> *The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.* Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. *He lacks both the skill and knowledge adequately to prepare his defense, , even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.* [Emphasis added.]

Justice COOLEY similarly noted the importance of the right, stating that " '[p]erhaps the privilege most important to the person accused of crime, connected with his trial, is that to be defended by counsel.' " *People v Pickens*, 446 Mich 298, 311; NW2d 797 (1994), quoting 1 Cooley, Constitutional Limitations (8th ed), p 696.

Because of its great importance in our adversary system, the right to the assistance of counsel includes the right to the effective assistance of counsel. *Cronic* at 654, citing *McMann v Richardson*, 397 US 759, 771, n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970).

In *People v Pickens, supra*, a majority of this Court held that the Michigan constitutional guarantee of the right to the effective assistance of counsel is coextensive with its federal counterpart. Consequently, this Court applied the two-part test announced by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The *Strickland* test requires examining whether counsel's errors fell below an objective standard of reasonableness and whether the errors so prejudiced the defendant so as to deprive him of a fair trial.

The *Strickland* performance/prejudice analysis is not the sole indicia of ineffective assistance. The United States Supreme Court in *Cronic, supra,* the companion case to *Strickland*, stated that the Sixth Amendment guarantee *generally* is not implicated unless there is some effect of counsel's substandard performance on the reliability of the trial process. The Court in *Cronic* further explained that there are circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. These circumstances include a complete denial of counsel at a critical stage of the proceedings, as occurred here, and a complete failure to subject the prosecution's case to meaningful adversarial testing. Another such circumstance, particularly applicable here, is "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659-660. Finally, a presumption of prejudice attaches when the state or the court prevents counsel from rendering assistance by directly interfering with the attorney-client relationship. *Geders v United States,* 425 US 80; 96 S Ct 1330; 47 L Ed 2d 592 (1976).

I would find that under the per se approach discussed in *Cronic* and *Geders*, defendant was denied the effective assistance of counsel.

III
PER SE STANDARD

When the surrounding circumstances make it so unlikely that any lawyer could provide effective assistance, ineffectiveness may be presumed without inquiry into actual performance or prejudice. *Cronic* at 661. As explained by the Court in *Cronic, Powell v Alabama* exemplifies this type of ineffectiveness.

In *Powell*, the United States Supreme Court relied on the Due Process Clause to find a denial of fundamental fairness to the "Scottsboro Boys," nine illiterate young black men accused of capital rape in Alabama in 1931. Six days before trial, the judge appointed "all the members of the bar" to represent the defendants for purposes of arraignment. *Id.* at 49. On the day of trial, a lawyer from Tennessee appeared after speaking to persons "interested" in the case. However, he stated that because he was unprepared and unfamiliar with local procedure, he was unwilling to represent the defendants on such short notice. The trial court resolved the problem by deciding that the Tennessee lawyer would represent the defendants with assistance from the local bar and ordered that the trial begin as scheduled.

The United States Supreme Court held that "such designation of counsel as was attempted was either so indefinite *or so close upon the trial as to amount to a denial of effective and substantial aid* . . . ." *Id.* at 53. Without examining the actual performance of counsel at trial, the Court concluded that under the circumstances, the trial was inherently unfair because the likelihood that counsel could have performed as an effective adversary was too remote. Critical to the Court's analysis was counsel's inability to prepare or to conduct pretrial investigation because of his appointment on the day of trial.

> It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was give. Defendants were immediately hurried to trial . . . . Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities. [*Id.* At 58.]

These words apply forcefully to Mr. Evelyn's representation of the defendant. As in *Powell*, the circumstances surrounding defendant's representation precluded crucial trial preparation. As in *Powell*, defendant was hurried to trial on the same day that counsel was able to first provide any meaningful pretrial assistance. As in *Powell*, this Court cannot assume some feigned tactical reason for counsel's failure to contact defendant while he was in prison or to otherwise investigate and interview witnesses during the critical thirty-four days before trial. Mr. Evelyn could not prepare for Mr. Mitchell's defense, as a matter of law, because he was prevented from doing so by his disciplinary suspension.[3]

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[3] Since *Powell*, other courts have held that a lack of preparation can constitute ineffectiveness per se. In *State v Johnson*, 24 Ohio St 3d 87; 494 NE2d 1061 (1986), the Supreme Court of Ohio held that failure to prepare for sentencing proceedings in a capital case was a violation per se of the defendant's Sixth Amendment rights. The court noted counsel's failure to investigate mitigating factors and his failure to discuss the penalty aspect of the case with his client before the sentencing hearing.

Similarly, in *State v Anderson*, 117 NJ Super 507; 285 A2d 234 (1971), modified on other grounds 60 NJ 437; 290 A2d 447 (1972), the Superior Court of New Jersey held that forcing a defendant

Other cases also illustrate circumstances justifying a presumption of ineffectiveness. A long line of federal and state precedent holds that Sixth Amendment rights are violated when the defendant is denied counsel at a critical stage in the proceedings. "*Cronic* and *Strickland* make clear that 'where actual or constructive denial of assistance of counsel occurs a per se rule of prejudice applies.' " *Crutchfield v Wainwright*, 803 F2d 1103, 1108 (CA 11, 1986), quoting *Chadwick v Green*, 740 F2d 897, 900 n 3 (CA 11, 1984).[4]

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to trial on the day that he first conversed with his defense attorney, and when counsel had done no other preparation, constituted ineffective assistance, without a specific finding of prejudice.

[4] The majority appears to suggest that only situations involving factors other than lack of preparation and investigation can justify application of a per se rule. *Cronic's* numerous and lengthy references to *Powell* irrefutably dispute this and make clear that the question whether lack of preparation and investigation justify a per se rule is one of degree. In this regard, *Cronic* and *Strickland* are factually distinguishable from the present case.

Cronic involved a young, fairly inexperienced attorney appointed to represent a defendant against mail fraud charges twenty-five days before trial. After careful analysis regarding the adequacy of the allowed preparation time, the court concluded that twenty-five days was "not so short that it even arguably justifies a presumption that no lawyer could provide the respondent with the effective assistance of counsel . . . ." *Id.* at 665. Clearly, the present case is more akin to *Powell* than to *Cronic* in regard to the circumstances surrounding the trial and the available preparation time.

Strickland is likewise distinguishable. It involved an attorney who, in preparing for a sentencing hearing, did not seek out character witnesses or request a psychiatric examination. Rather than determining that an insufficient investigation can never constitute ineffectiveness per se, the Court in *Strickland* held that counsel's decision not to present evidence concerning respondent's character and emotional state constituted a reasonable trial strategy under the circumstances presented in that case. As pointed out elsewhere in this opinion, no reasonable trial strategy exists for Mr. Evelyn's failure to investigate.

BEST AVAILABLE COPY

In *Geders, supra*, the Court held that a trial court's order preventing the defendant in a federal criminal prosecution from consulting his counsel "about anything" during a seventeen-hour recess in the trial between his direct and cross-examination deprived his of his right to the assistance of counsel. The Court emphasized that overnight recesses are often critical periods for preparation:

> Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. [*Geders* at 88.]

This being the case, the Court found that prejudice was so likely to result from the overnight denial of access to counsel that a specific inquiry into prejudice would be superfluous.[5]

Denial of counsel midtrial is but one example of a Sixth Amendment violation per se on the grounds of denial at a critical stage. *Powell, supra* at 57, also emphasizes the importance of counsel during the pretrial state:

> [P]erhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such

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[5] See also *Crutchfield v Wainwright, supra* (holding that the right to counsel was violated by the trial court admonition not to speak with his attorney during a brief trial recess if the record shows that the defendant requested access to his attorney); *State v Bryant*, 545 F2d 1035 (CA 6, 1976) (holding that absent extraordinary circumstances, the right to assistance of counsel was violated where a trial court directs that the defendant not communicate with counsel during a noon recess).

> aid during the period as at the trial itself.

In this case, the criminal justice and attorney disciplinary systems, without a doubt, combined to deny Mr. Mitchell any assistance of counsel for a full thirty-four days leading to his trial. This denial was especially egregious because counsel had not previously conducted a private in-depth interview with his client to hear his account of the first-degree murder charge and because challenges to the admissibility of evidence had not been addressed and res gestae witnesses had not been contacted.[6]

This is not an instance where counsel chose to take no action. Rather, the circumstances of counsel's disciplinary suspension and the trial court's refusal to assist the defendant in obtaining substitute counsel combined to deprive the defendant of his Sixth Amendment rights by effectuating a total denial of counsel during the critical pretrial period. To hold otherwise would be to say that trial preparation and investigation, in the context of a first-degree murder investigation, in the context of a first-degree murder trial, are not critical.[7] Such a holding would also be contrary to the United States Supreme Court's statements in *Powell* emphasizing the importance that adequate preparation plays in giving meaning to the right to counsel:

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[6] The majority relies in part on this Court's decision in *People v Pubrat,* 451 Mich 589, 594-595; 548 NW2d 595 (1996), for its conclusion that Mr. Everett's suspension during the critical pretrial state does not require reversal. *Pubrat*, however, is distinguishable and has little relevance to the situation presented here. *Pubrat* involved a suspended attorney who continued to actively represent his client during the suspension. Mr. Evelyn did not provide any assistance to Mr. Mitchell during the period of his suspension, which extended through the critical pretrial stage and ended on the morning of trial. While I was troubled, in *Pubrat*, by counsel's unauthorized representation, the situation here is qualitatively different and far more egregious from the defendant's perspective. Rather than receiving questionable counsel from a suspended attorney, defendant Mitchell received no counsel at all during this period.

[7] I also note that Mr. Evelyn's apparent ability to perform relatively well during trial is irrelevant in light of the constructive denial of counsel during the critical pretrial period. Although Evelyn might be a

> "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case." [*Id.* at 59, quoting *Commonwealth v O'Keefe,* 298 PA 169, 173; 148 A 73 (1929).]

The majority's suggestion that a finding that prejudice should be presumed violates "controlling precedent" causes some concern and merits examination. Although unclear, the precedent the majority apparently refers to are cases such as *Cronic* and *Strickland* in which the Court concluded that the claims of inadequate preparation or investigation did not merit a presumption of prejudice. In this regard, the majority states, "[t]he Supreme Court has rejected a categorical prophylactic

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very gifted trial lawyer who knows full well the "rules of the game," this cannot excuse the total lack of preparation. Defending a person in a first-degree murder trial is not a game. Effective representation must mean more than showing up and giving a good performance. If truth seeking is to play some role in our criminal justice system, defense attorneys must exert at least some effort to explore the truth so that, if there is exculpatory evidence available in favor of their client, they can present it.

I further note that Mr. Evelyn's letter to defendant, indicating that he could contact his law partner, Myzell Sowell, for assistance during his suspension, does not excuse or eliminate the constructive denial of counsel. Mr. Mitchell viewed Evelyn as his attorney, not Mr. Sowell. When Evelyn failed to provide defendant with assistance during the pretrial stage, defendant repeatedly asked the court for assistance in obtaining new counsel. He legitimately expected that the court would provide such assistance. Additionally, his mother left numerous messages at the Sowell & Evelyn firm. If Sowell truly had been available, he would have initiated some contact with the defendant.

approach to claims of counsel's deficient performance and of failure to adequately prepare or investigate in favor of an inquiry into actual performance and prejudice." *Ante* at 158. On the other hand, the majority begrudgingly recognizes. in n 10, that in some circumstances, such as those present in *Powell,* prejudice will be presumed.

The fact that the majority reaches a different conclusion than the one I reach does not render either conclusion violative of controlling authority. This is because the disagreement doe not concern the basic analytical framework. To the contrary, I agree with my respected sister's premise that the cases concerning ineffective assistance of counsel represent a continuum. My disagreement lies in where this case falls on that continuum.

Contrary to the majority's assertions, I do not contend that the thirty-day suspension alone warrants a finding of ineffective assistance of counsel per se or that a lack of preparation alone warrants a "categorical approach." Rather, I believe that the suspension, combined with the surrounding circumstances and the gravity of the charge justify a presumption of prejudice in this particular case. To reiterate, the record discloses that defendant's attorney was suspended from the practice of law for approximately thirty days before his trial began. The record further reveals that the defendant and his mother attempted to contact Mr. Evelyn on several occasions to arrange a meeting. Defendant also made numerous timely requests to the trial court to appoint him new counsel because he had not been able to tell his attorney his side of the case. In spite of all this, defendant was never able to meet privately with his attorney before trial after his preliminary examination, other than in the "bull pen" before hearings. Given the gravity of the charge, first-degree murder, and the constructive denial of counsel brought on by Mr. Evelyn's suspension and the trial court's refusal to appoint substitute counsel, defendant was denied his right to the effective assistance of counsel per se.

The majority criticizes this analysis by focusing on one element at a time, in isolation, from the totality of circumstances leading to the constructive. denial of counsel. Citing *Morris v Slappy*, 461 US 1; 103 S Ct 1610; 75 L Ed 2d 610 (1983), the majority concludes that denial of a 1983 continuance does not warrant a new trial. I agree that not every refusal of a continuance warrants a new trial. only those where there is an "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' . . . ." *Id.* at 12-13. The majority also cites *Cronic*, in support of its conclusion that the thirty-day suspension is not an external constraint constituting a constructive denial of counsel and that allegations of deficient performance due to inadequate preparation time do not justify a presumption of prejudice. I agree that a thirty-day suspension alone out of a seven-month period of representation, would not warrant the presumption. I also agree that not every case where an ill-prepared attorney is forced to trial will warrant the presumption. However, where all the circumstances attendant in this case combine, the whole is qualitatively different from each part taken in isolation. There is no "controlling precedent" in which all the particular circumstances present in this case combine, as they do hee, to effectuate a denial of counsel in the critical pretrial period.[8]

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[8] In its failure to recognize that our disagreement lies in where on the continuum this case falls, the majority argues that "the dissent offers no analysis with respect to how [witnesses Nelson and Woodson] might have made a difference at trial." *Ante* at 163. Given the conclusion that circumstances justify a presumption of prejudice, there is no need to offer such an analysis. A review of the facts, however, reveals that their testimony, as elicited at the *Ginther* hearing, would have at least undermined Mr. Thompson's testimony, given that their account of the events leading up to the killing did not support Thompson's portrayal of defendant as an instigator or director of the beating and subsequent killing. Further, their testimony differed from Mr. Thompson's

IV
WAIVER/ABANDONMENT OF RIGHT TO COUNSEL

The Court of Appeals concluded that by telling the trial judge six days into the trial that he no longer wanted to pursue the grievance he had filed against his attorney because he was satisfied with counsel's resolution of his concerns, defendant abandoned his ineffective assistance claim. Defendant's Sixth Amendment rights cannot be so easily brushed aside. The issue whether defendant's midtrial withdrawal of his grievance constitutes a waiver or abandonment of his ineffectiveness claim deserves a more searching analysis.

Defendant filed a grievance against Mr. Evelyn with the Attorney Grievance Commission, dated May 1, 1989. On the sixth day of trial, May 15, 1989, Mr. Evelyn moved to withdraw from the case in light of the grievance filed against him. The following colloquy, between Mr. Evelyn, Mr. Mitchell and the court ensued:

> *Mr. Evelyn:* I just want to bring a matter to the Court's attention. As Mr. Mitchell had indicated earlier in his request that I be removed, he did, in fact, file a grievance which I received in my office on Friday, and on Saturday I prepared a response which will go out today, and response includes my reference to the fact that we're in trial and that I think the Canon of Ethics require that I at least make a motion to withdraw from the case at this time, if his position is that he's still dissatisfied.
>
> I should note for the record that a number of things, the grievance is dated May 1, so a number of things that he was concerned about have been addressed, I should indicate – I suppose that its possible that his position may have been changed in light of that fact, but I think he should have an opportunity to bring that to the Court's attention and state on the record

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regarding the location and possession of the murder weapon and thus could have been useful to undermine Mr. Thompson's testimony.

> what his feelings are at this point.
>
> I think that I have to formally request that I be removed from the case at this time.
>
> *The Court:* Mr. Mitchell, anything you have to say?
>
> *Defendant Mitchell:* Yes. I would like to, you know, cancel that grievance, you know, because all the motions and everything that I requested have been answered.
>
> *The Court:* Okay. So your [sic] satisfied with your counsel?
>
> *Defendant Mitchell:* Yes, I'm satisfied, your Honor.
>
> *The Court:* All right, then, the motion to withdraw will be denied and we'll proceed.
>
> *Mr. Evelyn:* Okay.
>
> *Defendant Mitchell*: Thank You, your Honor.

A careful reading of this exchange does not comport with Mr. Mitchell waiving or abandoning his ineffective assistance claim concerning Mr. Evelyn's lack of pretrial investigation and preparation. His statement that he was "satisfied" with counsel cannot be fairly read to mean he no longer believed that it was unjust and prejudicial to force him to begin trial with unprepared counsel. Read in its proper contest, this "waiver" is nothing more than Mr. Mitchell's indication that he was "satisfied" with the resolution of the motions he had formerly requested. A close reading of the exchange also suggests that Mr. Mitchell had decided, probably with counsel's advice, to put aside his grievance in order to avoid aggravating the court by disrupting the trial's progress, given that the court's handling of defendant's previous motion for new counsel made clear that the first priority was to keep the trial on schedule.

Even if Mr. Mitchell's expression of "satisfaction" might be characterized as applying to his counsel's pretrial representation, and not just to counsel's efforts during the trial, the record does not support a knowing and intelligent waiver of counsel during the pretrial stage. Mr. Mitchell's motion for substitute counsel and his grievance regarding lack of pretrial representation clearly put the court on notice that he was not receiving the assistance of counsel during this critical state. If the court intended to secure a retroactive waiver of defendant's right to pretrial representation, it should have clearly informed defendant, on the record, that this was the intent.[9]

Here, defendant's "waiver" was not knowingly and intelligently made because he was never apprised of the right that he was waiving. Before trial, faced with a total lack of representation on Mr. Evelyn's part, defendant requested new counsel. The trial court did not resolve this request until the day of trial. Just before jury selection, when Mr. Mitchell again raised his right to effective representation, he was told that he could not have new counsel and that the trial would have to go forward. When Mr. Mitchell persisted that counsel had not interviewed him or heard his version of the events leading to the death, the court instructed him that he could tell his counsel anything he wished during the recess after the prosecutor's opening argument. He then admonished Mr. Mitchell:

> [I] Don't want to mislead you with the impression that just because you're still dissatisfied with your attorney that the Court is going to

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[9] In *People v Lane*, 453 Mich 132; 551 NW2d 382 (1996), this Court addressed the requirements of a valid waiver under MCR 6.005(D) at subsequent proceedings where a defendant had previously waived his right to counsel. This Court affirmed that the court should once again engage in the extensive *Anderson* litany, ensuring that the request to proceed without counsel is unequivocally, knowingly, intelligently, and voluntarily made. *People v Anderson*, 389 Mich 361, 697-368; NW2d 857 (1976). While neither the court rule nor the discussion in *Lane* addresses the requirements of a valid retroactive waiver, at least as much caution should be exercised. In fact, it could be argued that even more caution should be exercised in this context because of the possibility of confusion and misunderstanding inherent when rights are waived retroactively.

discontinue the trial and appoint new counsel.

Clearly, rather than acknowledging defendant's right to counsel during the critical pretrial stage, the court made clear that the trial would proceed regardless of defendant's lack of pretrial assistance. The court's handling of Mr. Evelyn's motion to withdraw, relied on by the Court of Appeals, for Mr. Mitchell's "waiver" of his Sixth Amendment rights, woefully failed to set forth on the record a knowing, intelligent, and voluntary waiver of his right to pretrial assistance of counsel. Consequently, his expression of "satisfaction" cannot be construed as a valid waiver.

Further, as noted in *Cronic*, a defendant's expression of satisfaction with counsel's performance at the time of trial, or his later expression of dissatisfaction, is not determinative of an ineffective assistance claim. *Id.* at 657, n 21. The defendant in *Cronic*, as here, expressed his satisfaction with counsel during the course of the trial because this seemed to be the prudent thing to do at the time. See *id.* at 652, n 6. The Court noted, "we attach no weight to either respondent's expression of satisfaction with counsel's performance at the time of his trial, or to his later expression of dissatisfaction." *Id.* at 657, n 21. Instead, the Court examined whether counsel's performance indeed met the standard required by the Sixth Amendment. Where constitutional rights are at issue, this Court must do no less.

V
CONCLUSION

I would hold that the circumstances of this case, particularly Mr. Evelyn's failure to prepare for defendant's trial for first-degree murder, attributable in part to his disciplinary suspension, and the trial court's failure to grant defendant's timely and reasonable request for new counsel combined to deprive Mr. Mitchell his right to the effective assistance of counsel under the per se standard explained in *Cronic*.

I would further hold that the defendant's midtrial expression of satisfaction with his trial counsel was not a valid waiver or an abandonment of his Sixth Amendment rights.

Consequently, I would reverse and remand for a new trial.

CAVANAGH, J. *(dissenting)*. I concur with Chief Justice MALLETT'S partial dissent in this matter. I write separately only to note my disagreement with my sister BOYLE'S repetitive dicta about sentencing guidelines. Within the next year we will have the Legislature's effort on sentencing guidelines, which should make my sister's continuing declamation on the subject all the more pointless.

WEAVER and KELLY, JJ., took no part in the decision of this case.